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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~565~~ 18

UNITED STATES, APPELLANT

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

FILED DECEMBER 4, 1959
PROBABLE JURISDICTION NOTED FEBRUARY 23, 1960

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INDEX

[fol. 1] (File Endorsement Omitted)

No. 41,429

IN THE
SUPREME COURT OF THE STATE OF KANSAS

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation, APPELLEE

vs.

GEORGE HETZEL; GRACE MARIE HETZEL; H. D. TAYLOR; AMY F. TAYLOR; BERT LEWIS; BUCK LEWIS; W. E. ROSTINE, WM. R ROSTINE, BOYD L. ROSTINE; and all persons who are or were doing business under the name of THE HUTCHINSON CONCRETE COMPANY; THE HOME LUMBER AND SUPPLY COMPANY, INC., a Corporation; HIRAM T. BURR, INC., a Corporation; A. A. DOERR MERCANTILE COMPANY, a Corporation; SARAH J. STOUT; CATHERINE M. BOSTWICK; W. L. ROGERS; MARIAN KOCH; H. F. THOMPSON; GEORGE J. LANGFELD; MILTON M. MEYER; DONALD MEYER; VIRGIL ERNSTING; AUGUST KRUEGER; ROY W. REVELL; MARY CATHERINE BARROW; and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown officers, successors, trustees, creditors and assigns of such defendants as are existing, dissolved, or dormant corporations; the unknown executors, administrators, trustees, creditors, successors and assigns of such defendants as are or were partners or in partnership; and the unknown guardians and trustees of such of the defendants as are minors or are in any wise under legal disability; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EDWARDS, APPELLEES

and

THE UNITED STATES OF AMERICA, APPELLANT

APPEAL FROM THE DISTRICT COURT OF EDWARDS COUNTY, KANSAS
HONORABLE LORIN T. PETERS, JUDGE

ABSTRACT OF APPELLANT, UNITED STATES OF AMERICA—filed February 6, 1959

* * * * *

[fol. 2] * * * *

[fol. 3] APPELLANT'S ABSTRACT

The following is a full and complete abstract of the record that is necessary for complete understanding of the question presented for review.*

IN THE DISTRICT COURT OF EDWARDS COUNTY, KANSAS

PETITION—Filed September 3, 1957

Comes now the above named plaintiff and for its cause of action against the defendants, states and alleges:

That plaintiff is a foreign corporation duly created, organized, and existing under and by virtue of the laws of the State of Massachusetts; that a certificate of authority has been issued by the Secretary of State of Kansas authorizing it to do business in this state;

That plaintiff has its principal place of business and correct post office address at 200 Berkeley Street, Boston, Massachusetts;

FIRST CAUSE OF ACTION

I.

Said plaintiff alleges that on the 29th day of May, 1951, the defendants, George Hetzel and Grace Marie Hetzel, [fol. 4] his wife, for a valuable consideration, made, executed and delivered to the plaintiff their certain installment promissory note in writing whereby they promised to pay to the order of plaintiff $25,000.00, with interest to be computed from May 1, 1951, at the rate of 4½% per annum, payable on the first day of each and every Janu-

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* Captions and signatures appearing on the original pleadings are omitted in this abstract. Exhibits attached to the various pleadings are also omitted as they are copies of notes, mortgages and liens which are not involved in this matter. Pleadings of the party defendants other than those included herein are omitted inasmuch as they are not pertinent to the question involved.

ary beginning January 1, 1952, upon all principal remaining from time to time unpaid; principal to be paid in installments as follows: $1,000.00 on the first day of January in each and every year thereafter to January 1, 1965, inclusive; and $11,000.00 on January 1, 1966. It was by said note further expressly agreed that if any default in payment of principal or interest or in the performance or observance of any of the covenants or agreements of any instrument now or hereafter securing this note, the principal remaining unpaid with accrued interest shall at once become due and payable, without notice, and the principal then remaining unpaid with accrued interest shall bear interest at the rate of 10% per annum. A true copy of said note is hereto attached, marked exhibit "A", and made a part hereof;

II.

Plaintiff further alleges that in order to secure the payment of said note and interest, the defendants, George Hetzel and Grace Marie Hetzel, his wife, at the same time duly executed and delivered a mortgage bearing date on that day, whereby they mortgaged, conveyed, and sold to the plaintiff the following described premises with their appurtenances, together with all former, existing and future irrigation and drainage system or systems on or used [fol. 5] in connection with said property, including all water rights, wells, machinery, equipment, rights of way and appurtenances thereunto belonging, used in connection therewith, or in any wise appertaining, whether owned by the mortgagors on the date of the mortgage or hereafter acquired, all of which shall be considered as affixed and appurtenant to the realty and subject to the lien and provisions of the mortgage, of which they were then and are now the owners, to-wit:

The southeast quarter (SE¼) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter (NW¼) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter (NW¼) of section twenty-three (23); thence running east 1025

feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence North 1191.5 feet; thence West 1321 feet to the West line of said section twenty-three (23); thence South to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half ($N\frac{1}{2}$) of section twenty-three (23), lying South and East of the A., T. & S. F. Railroad; also Lots one (1), two (2), and three (3) in section twenty-four (24) together with all accretioned land thereto, all in township twenty-four (24) South of Range nineteen (19) West of the sixth principal meridian, in Edwards County, Kansas;

That the said mortgage was and is a first lien upon said premises, and by its terms said defendants, George Hetzel and Grace Marie Hetzel, his wife, agreed to pay the principal amount secured thereby with interest there-
[fol. 6] on according to the terms of the note, marked exhibit "A"; and further agreed to keep the buildings now or thereafter standing on the premises insured against fire and such other casualties as the plaintiff may require; to pay all taxes, assessments and charges of every nature and to whomsoever assessed and before penalty has attached thereto, that may now or hereafter be levied or assessed upon the premises or any part thereof, upon the rents, issues, income or profits thereof, whether any or all of said taxes, assessments, or charges be levied directly or indirectly or as excise taxes or as income taxes; to pay all sums the failure to pay which may result in the acquisition of a lien prior to the lien of this mortgage before such a prior lien may attach. Said mortgage further provided that if payments are made as therein contemplated, the mortgage shall be null and void but upon any default in the performance or observance of any of the covenants and agreements of the instrument hereby evidencing or securing the principal secured, then the whole of the indebtedness secured hereby shall at the election of the plaintiff become immediately due and payable without notice and the plaintiff may immediately cause the mortgage to be foreclosed.

III.

Said mortgage was duly acknowledged, the registration fee thereon paid as shown by the endorsement of the Register of Deeds of Edwards County, Kansas, thereon, and said mortgage was duly recorded in the office of the Register of Deeds of said County, on the 29th day of May, 1951, at 11:00 A.M., in Book 26 of mortgages, at [fol. 7] page 188, a true copy of said mortgage is hereto attached, marked exhibit "B", and made a part hereof;

That no part of said note has been paid, except: payments on account of principal in the amount of $4,160.00, together with interest through January 1, 1956; except for interest on $160.00 principal paid July 31, 1956 and due January 1, 1957; and that there is now due on said note and mortgage the sum of $22,594.28 with interest thereon from May 6, 1957, at the rate of ten per cent per annum computed as follows:

Interest on $160 principal due 1/1/56 to 7/31/56 @ 10%	9.38
Balance principal payment due 1/1/56	840.00
Interest on $840 due 1/1/56 to 5/6/57 @ 10%	113.40
Interest on $20,000 principal 1/1/56 to 1/1/57 @ 4½%	900.00
Interest on $900 Int. 1/1/57 to 5/6/57 @ 10%	31.50
Principal due 1/1/57 by default	20.000.00
Interest on $20,000 1/1/57 to 5/6/57 @ 10%	700.00
Total indebtedness to 5/6/57, inclusive	22,594.28

and by reason of the default in the payment of principal and interest, the plaintiff elected to exercise its option to declare the entire principal sum of said note due and payable as of January 1, 1957, and the mortgage securing the same absolute and subject to foreclosure, and by reason of such default and election there is now due and owing to said plaintiff from said defendants, George Hetzel and Grace Marie Hetzel, his wife, the sum of $22,594.28 with interest thereon from May 6, 1957, at the

[fol. 8] rate of 10% per annum, and that said mortgage has become absolute and should be foreclosed and the real estate therein described, sold to satisfy the lien thereof.

IV.

Plaintiff further alleges the defendant, United States of America, acting through the Administrator of Farmers Home Administration claims a lien upon said real estate, the exact nature of which is to this plaintiff unknown, subject to the mortgage of the plaintiff, by virtue of a mortgage on said real estate, executed by the defendants George Hetzel and Grace Marie Hetzel, his wife, which mortgage was duly recorded in the Office of the Register of Deeds, in and for said County, on the 22nd day of October, 1953, at 4:40 P.M., in Book 26 of Mortgages on page 377, in the principal amount of $10,000.00.

V.

Plaintiff further alleges that the defendants, George Hetzel and Grace Marie Hetzel, leased for oil and gas the SW¼ of section 22, township 24 south, range 19 west of the 6th p.m., subject to the right of way of the A. T. & S. F. Railroad and public highway, to H. F. Thompson, by instrument dated August 1, 1952, for a ten year primary term from said date, which instrument was duly recorded in the Office of the Register of Deeds, in and for said County, on March 2, 1953, at 11:00 A.M., in Book 33 misc. records on page 318. That plaintiff waived the priority of mortgage and excepted and released the working interest held under and by virtue of said oil and gas lease from the lien of plaintiff's mortgage and agreed that [fol. 9] said lease should have the same validity and effect as if executed, delivered and recorded prior to the date of execution of said mortgage; that the defendants, H. F. Thompson, George J. Langfield, Milton M. Meyer, Donald Meyer, Virgil Ersting, August Krueger, Marian Koch, Roy W. Revell, Mary Katheryn Barrow, W. L. Rogers, and Edward A. Bortz, are assignees of the lease.

VI.

Plaintiff does not know the place of residence or addresses of any of the defendants above named and designated except as hereinafter stated.

VII.

Plaintiff does not know whether the individual defendants above named and designated, or any of them, are living or deceased, and does not know the names or addresses of the heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased. Plaintiff is informed the defendants H. D. Taylor, Amy F. Taylor, and H. F. Thompson, Bert Lewis and Buck Lewis, are residents of Kinsley, Kansas, that their post office address is that City; that the defendants George Hetzel and Grace Marie Hetzel are residents of Edwards County, Kansas, that their post office address is Rural Route, Kinsley, Kansas; Plaintiff does not know whether The Hutchinson Concrete Company was a firm, partnership or corporation, but is informed that W. E. Rostine, Wm. R. Rostine, and Boyd L. Rostine, if the firm was not incorporated, are or were doing business under the name of The Hutchinson Concrete Company, [fol. 10] having post office address at P. O. Box 646, Hutchinson, Kansas; and plaintiff does not know the names of the executors, administrators, trustees, creditors and assigns of such defendants as are or were partners or in partnership.

VIII.

Plaintiff does not know whether the defendants, The Home Lumber and Supply Company, Inc., A Corporation; Hiram T. Burr, Inc., A Corporation; A. A. Doerr Mercantile Company, A Corporation, are existing, dissolved or dormant corporations, and does not know the names or addresses of their officers, successors, trustees, creditors and assigns.

IX.

Plaintiff does not know whether any of the defendants are married, and does not know the names or addresses of

the spouses of such of the defendants as may be married, or any of them, except the defendants George Hetzel and Grace Marie Hetzel, his wife.

X.

Plaintiff does not know whether any of the defendants are minors or are under legal disability, and does not know the names, residences or addresses of the guardians or trustees of such defendants or any of them.

XI.

None of the defendants herein has designated any process agent upon whom service of summons can be made within the State of Kansas, under the provisions of the Statutes of Kansas relating thereto.

[fol. 11]

XII.

The defendants, above named and designated, in the caption hereof, and each of them, claim some title, estate or interest in or lien upon the mortgaged premises above described, adverse to the plaintiff, the exact nature of which is unknown to the plaintiff, but plaintiff alleges that whatever claim or right or interest the defendants have or may have had are void and inferior and junior to the lien of the plaintiffs' mortgage, and that the judgment to be rendered herein should so provide.

SECOND CAUSE OF ACTION

I.

Said plaintiff adopts the allegations and averments heretofore made in this petition and incorporates the same herein by reference as a part hereof, and further alleges that taxes for the years 1953, 1954, 1955, and 1956 were duly levied and assessed against the above described real estate, and were not paid by said mortgagors when due; that to protect the lien of its mortgage and by virtue of the provisions therein contained, said plaintiff was forced to and did, on June 12, 1957, pay and advance to the County Treasurer of Edwards County, Kansas, the sum

of $2,803.07, being the amount of unpaid taxes with interest, penalties and costs, and is now the owner and holder of tax receipts therefor; that by reason of such default and payment, there is now due and owing to the plaintiff from the defendants, George Hetzel and Grace Marie Hetzel, his wife, the sum of $2,803.07, with interest at ten per cent per annum from June 12, 1957, for which [fol. 12] plaintiff is entitled to judgment, and that said sum is a lien upon the real estate above described and is secured by the mortgage foreclosed herein.

THIRD CAUSE OF ACTION

I.

Said plaintiff adopts the allegations and averments heretofore made in this petition and incorporates the same herein made by reference as a part hereof, and further alleges that the defendants George Hetzel and Grace Marie Hetzel, his wife, mortgagors, failed to keep said premises insured and in consequence thereof plaintiff caused them to be insured in the Springfield Fire & Marine Insurance Company for a term of one years from the 23rd day of April, 1957, and paid the premium of 157.15 dollars to protect the lien of its mortgage and by virtue of the provisions therein contained; that by reason of the failure of defendants, George Hetzel and Grace Marie Hetzel, his wife, to pay said insurance premium, there is now due and owing to the plaintiff from the said defendants the sum of $157.15 with interest at the rate of ten percent per annum from April 23, 1957, for which plaintiff is entitled to a judgment, and that said sum is a lien upon the real estate above described and is secured by the mortgage foreclosed herein.

Wherefore, Plaintiff demands judgment adjudging the amount due on said note and mortgage, against the defendants George Hetzel and Grace Marie Hetzel, his wife, in the sum of $22,594.28, with interest at ten per cent per annum from May 6, 1957, and the further sum of $2,803.07 with interest at ten per cent per annum from June 12, [fol. 13] 1957, for taxes paid by plaintiff upon said premises, and the further sum of $157.15 with interest at ten

per cent per annum from April 23, 1957, for insurance premiums on the buildings on said premises paid by plaintiff, together with costs and disbursements, and for judgment decreeing the mortgage above described to be a first lien upon the real estate described therein and that said first mortgage be foreclosed and adjudging and directing a sale of the premises aforesaid according to law by the Sheriff of Edwards County, Kansas, and that the proceeds arising from such sale be applied as follows:

1. In payment of the costs of this suit and of such sale;
2. In payment of any taxes then due and unpaid on said real estate;
3. In payment of the amount adjudged due the plaintiff herein;
4. And that the balance, if any, be brought into court to abide the further order of the court.

And for further judgment, that the defendants, and all persons claiming by, through or under them, be forever barred and foreclosed and excluded of all rights, claims, liens, interest, estate or equity in and equity of redemption in said mortgaged premises, and every part thereof, adverse to the title and possession of the purchaser at such sale, except only the statutory right to redeem said premises as provided by the Laws of Kansas, and that plaintiff have such other and further relief, as to the court shall seem just and proper.

[fol. 14] IN DISTRICT COURT OF EDWARDS COUNTY

Separate Answer and Cross-Petition of United States

For its separate answer to this cause of action the defendant, United States of America, alleges and states:

1. Being without knowledge and information to form a belief as to the truth of the allegations contained in plaintiff's Petition filed herein, this answering defendant denies all the allegations stated in said Petition.

Cross-Petition

For its Cross-Petition herein, the defendant, United States of America, states:

1. That the defendants George Hetzel and Grace Marie Hetzel are indebted to the Farmers Home Administration, an agency of this answering defendant, in the following amounts:

(a) $584.91 representing unpaid principal and interest due on a promissory note executed by defendant George Hetzel and delivered to the Governor of the Farm Credit Association, the predecessor of the Farmers Home Administration, an agency of this defendant, dated April 25, 1934, in the face amount of $250.00.

(b) $874.77 representing unpaid principal and interest due on a promissory note executed by defendants George Hetzel and Grace Hetzel and delivered to the Governor of the Farm Credit Association, the predecessor of the Farmers Home Administration. an agent of this defendant, dated September 14, 1936, in the face amount of $400.00.

(c) $10,317.39 representing the unpaid principal and interest due on a promissory note executed by defendants [fol. 15] George Hetzel and Grace Hetzel and delivered to the Farmers Home Administration, an agency of the defendant, dated September 4, 1953, in the face amount of $10,565.00. A real estate mortgage was executed by the defendants George Hetzel and Grace Hetzel and delivered to the Farmers Home Administration, an agency of the defendant, to secure payment of said note of $10,565.00. Said mortgage was filed in the office of the Register of Deeds of Edwards County, Kansas, on October 22, 1953, at 4:40 P.M., and recorded at Book 26, Page 377 of the records of said office.

(d) $1,167.81 representing the unpaid principal and interest due on a promissory note executed by defendants George Hetzel and Grace Hetzel and delivered to the Farmers Home Administration, an agency of this defendant, dated May 3, 1954, in the face amount of $1,000.00. A crop and chattel mortgage was executed by the defendants George Hetzel and Grace Hetzel and delivered

to the Farmers Home Administration, an agency of this defendant, to secure payment of said note of $1,000.00 and the note referred to in paragraph 1(c) hereinabove. Said mortgage was filed in the office of the Register of Deeds of Edwards County, Kansas, on July 16, 1957, at 1:00 P.M. and duly recorded in the records of said office.

2. That the lien described in paragraph 1(c) hereinabove, together with the other debts described in paragraph 1 above, constitute liens inferior only to that of plaintiff herein, on the real property of defendants George Hetzel and Grace Hetzel situated in Edwards County, Kansas, to-wit:

[fol. 16] The southeast quarter (SE¼) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter (NW¼) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter (NW¼) of section twenty-three (23); thence running east 1025 feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence North 1191.5 feet; thence West 1321 feet to the West line of said section twenty-three (23); thence South to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half (N½) of section twenty-three (23), lying South and East of the A., T. & S. F. Railroad; also Lots one (1), two (2), and three (3) in section twenty-four (24) together with all accredited land thereto, all in township twenty-four (24) South of Range nineteen (19) West of the sixth principal meridian, in Edwards County, Kansas.

3. That a Certified Statement of Account reflecting all payments made by and credits due to the above-named defendants on the above-described indebtedness, together with copies of the notes and mortgages referred to in paragraph 1 hereinabove are attached hereto, marked Exhibits "A", "B", "C", "D", "E", "F" and "G" are made a part hereof.

4. That there is due and owing from the defendants George Hetzel and Grace Hetzel to this answering defend-

ant on the notes described in paragraph 1 hereinabove, the total amount of $12,944.83 as of September 26, 1957, together with daily interest thereafter on said amount of $1.4534; that upon demand, defendants George Hetzel and [fol. 17] Grace Hetzel have failed and otherwise refused to pay said sum to this defendant.

Wherefore, this answering defendant prays that the Court find that the United States of America has a lien on the real estate of defendants George Hetzel and Grace Hetzel in the amount of $12,944.83 with interest thereon at the rate of $1.4534 daily after September 26, 1957, until paid; that said lien is inferior only to that of plaintiff herein on said property, and in the event the Court shall enter an order providing for the judicial sale of the above-described real estate, that after the payment of costs and expenses and plaintiff's lien, the proceeds of such sale be next applied to this answering defendant's lien, and for all other relief in the premises.

IN DISTRICT COURT OF EDWARDS COUNTY

Separate Answer of Bert Lewis and Buck Lewis

For their separate answer to this cause of action, the defendants, Bert Lewis and Buck Lewis, allege and state:

1. Being without knowledge and information to form a belief as to the truth of the allegations contained in plaintiff's petition filed herein, these answering defendants deny all the allegations stated in said petition.
2. And for their further answer, herein, the defendants state as follows: That the defendant, George Hetzel, is indebted to the defendants, Bert Lewis and Buck Lewis, in the amount of $1,714.61, which sum or sums are secured by a certain personal property mortgage, executed June 7, 1957, upon the following described personal property, to-wit:

[fol. 18] 1 Model 317 V8 Ford Industrial Motor,
1 Gardner Denver 3x4 Pump,
1600 feet of 6 inch aluminum pipe and fittings,
1000 feet of 4 inch aluminum pipe and fittings with 24 rainbird sprinklers;

which mortgage was filed in the office of the Register of Deeds of Edwards County, Kansas, on July 10th, 1957, at two o'clock P.M., as Chattel Mortgage, No. 2381, and said chattel mortgage is hereto attached, marked "Exhibit A," and made a part hereof.

3. That the mortgage of the plaintiff herein is junior, inferior, and invalid as against the chattel mortgage of these defendants, Bert Lewis and Buck Lewis, upon the above described personal property, for the following reasons:

a. The above described personal property was not owned by the defendants, George Hetzel and Grace Marie Hetzel, mortgagors, at the time of the execution of plaintiffs' mortgage herein, nor had said mortgagors contemplated the immediate acquiring of said property.

b. That the defendants, George Hetzel and Grace Marie Hetzel, acquired title to the personal property hereinbefore described after the execution of the mortgage as alleged in plaintiff's petition.

c. That the defendants, George Hetzel and Grace Marie Hetzel, executed a purchase money mortgage upon the above described personal property, to Hiram T. Burr, Inc., et al., and that the defendant, George Hetzel, subsequently executed the chattel mortgage a copy of which is attached

[fol. 19] hereto and marked "Exhibit A", to defendants, Bert Lewis and Buck Lewis, for the sum of $1,714.61, and that said sum or sums were paid directly to Hiram T. Burr, Inc., et al., and that as a result thereof, said chattel mortgage executed to these defendants became, and is, a purchase money mortgage upon the above described personal property.

d. That the plaintiff herein failed to properly file its mortgage as alleged in plaintiff's petition for record as a chattel mortgage in the office of the Register of Deeds of Edwards County, Kansas, and that the defendants, Bert Lewis and Buck Lewis, had no constructive notice of plaintiff's claim upon the above described personal property.

e. That the defendants, Bert Lewis and Buck Lewis, had no actual notice of plaintiff's claim or alleged chattel mortgage upon the above described personal property.

4. And for further answer the defendants, Bert Lewis and Buck Lewis, disclaim all right, title, and claim to the real estate mortgaged to the plaintiff herein, as alleged in plaintiff's petition.

5. And for further answer, these defendants state and allege, that none of the personal property, as above described, and as set out in attached "Exhibit A", is in any way affixed or appurtenant to the realty described in plaintiff's petition.

And that for the above and foregoing reasons the plaintiff's claim or alleged chattel mortgage upon the personal property above described is invalid, but should [fol. 20] the court find that plaintiff has any interest or lien upon said personal property, that the same is junior and inferior to the chattel mortgage of defendants, Bert Lewis and Buck Lewis, upon all of the above described personal property.

Wherefore, these answering defendants pray that the court find that the alleged lien or chattel mortgage of the plaintiff is invalid; but that should the court find that the plaintiff has any claim against said personal property, that the court further find that these defendants, Bert Lewis and Buck Lewis, have a first and prior lien upon the personal property, above described, in the amount of $1,714.61, with interest thereon at the rate of 6% per annum from June 7th, 1957, until paid; that said lien is senior to that of plaintiff herein and any other party hereto on said personal property; and in the event the court shall enter an order providing for the judicial sale of the above described personal property, that after the payment of costs, the proceeds of such sale be first applied to these answering defendants' lien, and for all other relief in the premises.

IN DISTRICT COURT OF EDWARDS COUNTY

Disclaimer of John Hancock Mutual Life Insurance Company

Comes now the plaintiff, John Hancock Mutual Life Insurance Company, a corporation, and says that it denies that it claims any lien upon or interest in the following described personal property, to-wit:

1 model 317V8 Ford Industrial Motor;
1 Gardner Denver 3x4 pump;
1600 feet of 6 inch aluminum pipe and fittings;
1000 feet of 4 inch aluminum pipe and fittings with 24 rainbird sprinklers;

[fol. 21] covered by a chattel mortgage from George Hetzel to Bert Lewis and Buck Lewis, recorded in office of the Register of Deeds of Edwards County, Kansas, on July 10, 1957, at 2:00 P.M., as chattel mortgage, No. 2381.

IN DISTRICT COURT OF EDWARDS COUNTY

Answer to Cross Petition by John Hancock Mutual Life Insurance Company

For its separate answer to the cause of action of the defendant, United States of America, the plaintiff alleges and states:

1. Being without knowledge and information to form a belief as to the truth of the allegations contained in defendant's, United States of America, cross petition filed herein, this answering plaintiff denies each and every allegation of fact in the petition contained.

IN DISTRICT COURT OF EDWARDS COUNTY

Journal Entry of Judgment—December 4, 1957

Now on this 4th day of December, 1957, being an adjourned day of the regular October, 1957, term of said court, the above entitled case comes regularly on for hearing, the plaintiff John Hancock Mutual Life Insurance

Company, appearing by James R. Boyd, its attorney; and the defendant and cross-petitioner, United States of America, appearing by E. Edward Johnson, Assistant United States Attorney, District of Kansas; and the defendants Bert Lewis and Buck Lewis, appearing by Rae E. Batt, their attorney; and the defendants H. F. Thompson *pro se* and George J. Langfeld, Milton M. Meyer, Donald Meyer, Virgil Ernsting, August Krueger, Marian Koch, Ray W. Revell, Mary Kathryn Barrow, W. L. Rogers, Edward A. Bortz, appearing by H. F. Thompson, their attorney; [fol. 22] the defendants in the military service appear by Rae E. Batt, their attorney appointed by the court, and the defendants who are minors or are in anywise under legal disability appear by Rae E. Batt, their guardian *ad litem*; and the defendant, Hiram T. Burr, Inc., appearing by its attorneys, Minner and Waite; and the remaining defendants appearing not, either in person or by attorney, but wholly making default herein, and thereupon, the case being called for trial, a jury is waived and the case is tried to the court, and the court having heard the evidence and arguments of counsel, and being fully adivsed in the premises finds:

That the defendants George Hetzel; Grace Marie Hetzel; H. D. Taylor; Amy F. Taylor; H. F. Thompson; The Board of County Commissioners of the County of Edwards; Bert Lewis; Buck Lewis; Hiram T. Burr, Inc., a Corporation; A. A. Doerr Mercantile Company, a Corporation; The Home Lumber and Supply Company, Inc., a Corporation; W. E. Rostine, Wm. R. Rostine, Boyd L. Rostine, doing business under the firm name of Hutchinson Concrete Company; have each and all been duly and regularly served with summons as required by law, and as shown by Sheriff's returns filed herein, which service of summons were regular and in accordance with law, and the same are hereby approved; that the defendant, United States of America acting through the Administrator of Farmers Home Administration, has been duly and regularly served with process as required by United States Code, Title 2832410, as shown by Sheriff's return and registered return mail receipt filed herein, which service of summons and process and mailing of process and com-

plaint was regular and in accordance with law, and the same is hereby approved.

[fol. 23] Thereupon, plaintiff shows to the court, and the court further finds that the defendants, Sara J. Stout, Catherine M. Bostwick, W. L. Rogers, Marian Koch, George J. Langfeld, Milton M. Meyer, Donald Meyer, Virgil Ernsting, August Krueger, Roy W. Revell, Mary Katheryn Barrow, have been duly and regularly served with summons by publication according to law, and the affidavit for such service, the published notice of suit and the proof of publication thereof are presented to, examined and approved by the court; and the court further finds that said defendants Sara J. Stout, and Catherine M. Bostwick have failed to answer or otherwise plead to plaintiff's petition and are wholly in default, except the defendants in military service, who appear by their attorney appointed by the court, and the defendants under disability, who appear by their guardian *ad litem*, as herein set out.

The court further finds that the plaintiffs have filed an affidavit showing that they do not know and are unable to determine whether the defendants or any of them are in the military service of the United States as defined by the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, and the court has heretofore appointed an attorney to represent and protect the interests of any of the defendants who are in the military service as defined by said act, and said attorney has filed answer consisting of general denial and appears for said defendants as above set out, and the court finds that the ability of the said defendants to conduct their defense is not materially affected by reason of their military service.

[fol. 24] The court further finds that a guardian *ad litem* has heretofore been appointed for such of the defendants named and designated in plaintiffs' petition as are minors or are in any wise under legal disability, and that said guardian *ad litem* has filed answer consisting of general denial and appears for the said defendants as above set out.

The court further finds that the United States of America has filed its answer and cross petition herein;

that the defendants Bert Lewis and Buck Lewis have filed their answer; that the defendants Hiram T. Burr, Inc., H. F. Thompson, George J. Langfeld, Milton M. Meyer, Donald Meyer, Virgil Ernsting, August Krueger, Marion Koch, Ray W. Revell, Mary Katheryn Barrow, W. L. Rogers, and Edward A. Bortz have filed their disclaimers denying the existence of any claim, lien, or interest in the property which is the subject of this action.

The court further finds that the plaintiff is a corporation created, organized and existing under the laws of the State of Massachusetts, licensed to do business in the State of Kansas;

The court further finds that the plaintiff has filed its disclaimer denying the existence of any claim, lien or interest in personal property secured by a chattel mortgage recorded in the office of the Register of Deeds of Edwards County, Kansas, July 10, 1957, as chattel mortgage No. 2381, described as: 1 model 317V8 Ford Industrial Motor; 1 Gardner Denver 3x4 pump; 1600 feet of 6 inch aluminum pipe and fittings; 1000 feet of 4 inch aluminum pipe and fittings with 24 rainbird sprinklers.

[fol. 25] The court further finds that the allegations contained in the plaintiff's petition are true; that on the 29th day of May, 1951, defendants George Hetzel and Grace Marie Hetzel executed and delivered to plaintiff their certain promissory note for Twenty-five thousand dollars ($25,000.00) with interest thereon to be computed from May 1, 1951, at the rate of 4½% per annum, payable on the first day of each and every January, beginning January 1, 1952, upon all principal remaining from time to time unpaid, the principal of said note to be paid in installments, as set forth in plaintiff's petition; it being specifically provided that if any default in payment of principal or interest or in the performance or observance of any of the covenants or agreements of any instrument now or hereafter securing the note, the principal remaining unpaid with accrued interest shall at once become due and payable, without notice, and the principal then remaining unpaid with accrued interest shall bear interest at the rate of 10% per annum until paid; that the makers of said note made default in the payment of principal installment and interest due and payable; and they are

also in default in the payment of subsequent maturing installments of principal and interest thereon as alleged in plaintiff's petition and that such default continued prior to the institution of this action, and that the plaintiff elected to declare said indebtedness, principal and interest, due and payable by reason of such default, and that there is now due from the defendants, George Hetzel and Grace Marie Hetzel, to the plaintiff the sum of Twenty-two thousand five hundred and ninety four dollars and twenty-eight cents ($22,594.28), the amount of principal [fol. 26] and interest due May 6, 1957, with interest thereon at the rate of 10% per annum from May 6, 1957, and the costs of this action taxed at $............

The court further finds that, to secure the payment of said note and interest thereon, the defendants George Hetzel and Grace Marie Hetzel, executed and delivered to plaintiff their certain mortgage, dated May 29, 1951, acknowledged by the mortgagors May 29, 1951, before H. D. Taylor, notary public in and for Edwards County, Kansas, which was filed for record May 29, 1951, and recorded in Book 26 of mortgages at page 188, of the records in the office of the Register of Deeds of Edwards County, Kansas, which mortgage is on all of:

> The southeast quarter (SE¼) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter (NW¼) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter (NW¼) of section twenty-three (23); thence running east 1025 feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence North 1191.5 feet; thence West 1321 feet to the West line of said section twenty-three (23); thence South to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half (N½) of section twenty-three (23); lying South and East of the A. T. & S. F. Railroad; also Lots one (1), two (2), and three (3) in section twenty-four (24) together with all accretioned land thereto, all in township twenty-four (24) South of Range nineteen (19) West of the sixth principal meridian, in Edwards County, Kansas;

[fol. 27] that under the terms of said mortgage it is provided that, in case the mortgagors fail to pay the taxes levied and assessed against the premises, the owner and holder of said mortgage indebtedness has the right to pay the same, and that the amount so paid should become a lien against said property and bear interest at the rate of 10% after the date of payment and that on June 12, 1957, the plaintiff paid $2,803.07 taxes, which were a lien on said premises under the terms of said mortgage, and is entitled to interest thereon from said date at the rate of 10% per annum, amounting to $2,803.07 with interest at 10% per annum from June 12, 1957. Further, that under the terms of said mortgage it is provided that, in case the mortgagors fail to keep the buildings now or thereafter standing on the premises insured against fire and such other casualties as the plaintiff may require, the owner and holder of said mortgage indebtedness has the right to insure the premises, and that the amount so paid shall become a lien against said property, and bear interest at the rate of 10% after the date of payment, and that on April 23, 1957, the plaintiff paid $157.15 insurance premium to the Springfield Fire and Marine Insurance Company for a term of one year from April 23, 1957, which was a lien on said premises under the terms of said mortgage and is entitled to interest thereon from said date at the rate of 10% per annum, amounting to $157.15 from April 23, 1957, with interest at 10% per annum from April 23, 1957.

The court further finds that, by reason of default in payment of said indebtedness secured by said mortgage aforesaid, the conditions of said mortgage have been [fol. 28] broken, and the plaintiff at the institution of this action was and is now entitled to foreclose the same under the terms thereof, that said mortgage is a first and prior lien for all of the indebtedness hereinbefore described, and that from and after the sale of the premises all of the defendants to this action shall be forever barred and estopped from claiming any right, title, lien, estate or interest in, to, and upon said premises and every part thereof, as against the purchaser at such sale.

The court further finds that on the 4th day of September, 1953, defendants, George Hetzel and Grace Marie Hetzel, his wife, executed and delivered to The Farmers Home Administration, an agency of the defendant, United States of America, their certain promissory note for $10,500.00 with interest thereon from date at the rate of 5% per annum on unpaid balances, the principal of said note being paid in installments, as set forth in defendants', United States of America, cross petition; It being specifically provided that, if any of said installments of interest or principal should not be paid when due, then said note, at the option of the holder, shall become due and payable; that the makers of said note made default in payment of the installment and interest due and payable, and that such default, continued for more than ten days prior to the institution of this action, and that defendant, United States of America, elected to declare said indebtedness, principal and interest, due and payable by reason of such default and that there is now due from the defendants, George Hetzel and Grace Marie Hetzel, his wife, the sum of $10,317.39, the amount of principal and interest due as [fol. 29] of September 26, 1957, together with interest on $9,025.62 from said date at the rate of five percent per annum, as provided in said note, amounting to $85.22, making a total of $10,402.61, plus additional interest on $9,025.62 at the rate of $1.2365 daily from this date.

The court further finds that, to secure the payment of said note and interest thereon, the defendants, George Hetzel and Grace Marie Hetzel executed and delivered to defendant, United States of America their certain mortgage, subject to the mortgage of the plaintiff, dated October 22, 1953, acknowledged by the mortgagors October 22, 1953, before Myrtle Richardson, a notary public in and for Edwards County, Kansas, which was filed for record October 22, 1953, and recorded in Book 26 at page 377, of the records in the office of the Register of Deeds of Edwards County, Kansas; which mortgage is on the property hereinabove described; that said cross petitioner, United States of America, is entitled to judgment on the cause of action herein set out against the defendants, George Hetzel and Grace Marie Hetzel, in the sum of $10,402.61 with interest

on $9,025.62 at the rate of $1.2365 per day from December 4, 1957, and that by virtue of said mortgage, said judgment is a second lien upon the real estate above described, subject only to the lien of the judgment herein rendered in favor of the plaintiff.

The court further finds that the allegations contained in defendant's United States of America cross petition, numbered 1(a), 1(b), and 1(d), as represented by exhibits "A", "D", and "H", are true and correct and that the defendant, United States of America, is entitled to [fol. 30] judgment on the cause of action herein set out at 1(a) against the defendant George Hetzel in the further sum of $586.98 with interest on $249.65 at the daily rate of $.0307 from this date; and do have and recover from the defendants George Hetzel and Grace Marie Hetzel, the further sum of $2,055.41, with interest on $1,400.00 at the daily rate of $.1862 from this date.

It Is Therefore Ordered, Adjudged, and Decreed by the Court that the plaintiff have and recover of the defendants, George Hetzel and Grace Marie Hetzel, the sum of $26,944.78, with interest thereon at the rate of ten percent per annum from this date, and costs of this action, which judgment is hereby decreed to be a valid first lien upon the real estate above described.

It Is Further Ordered, Adjudged, and Decreed by the Court that the defendant, United States of America, do have and recover of the defendants, George Hetzel and Grace Marie Hetzel, the sum of $10,402.61 with interest on $9,025.62 at the rate of $1.2365 per day from this date, and for costs, which judgment is hereby decreed to be a second lien upon the real estate above described, subject only to the lien of plaintiff herein as above set forth.

It Is Further Ordered, Adjudged, and Decreed by the Court that the defendant, United States of America, do have and recover of the defendant, George Hetzel, the further sum of $586.98 with interest on $249.65 at the daily rate of $.0307 from this date; and do have and recover from the defendants George Hetzel and Grace Marie Hetzel, the further sum of $2,055.41, with interest on $1,400.00 at the daily rate of $.1862 from this date.

[fol. 31] It Is Further Ordered, Adjudged, and Decreed by the Court that the defendants, Bert Lewis and Buck

Lewis, have a first and prior lien on the items of personal property described in a chattel mortgage recorded in the office of the Register of Deeds of Edwards County, Kansas, July 10, 1957, No. 2381.

It Is Further Ordered, Adjudged, and Decreed by the Court that said first and second mortgage be foreclosed. That if said defendants, George Hetzel and Grace Marie Hetzel, fail to pay said judgments within ten days from this date, on order of sale issue herein, as by law made and provided, directed to the Sheriff of Edwards County, Kansas; commanding said Sheriff to advertise and sell said described premises, according to law; and subject to redemption for the period of eighteen months after the date of said sale; and that the proceeds arising from said sale be applied as follows:

First: to the payment of the costs of this action, and of said sale;

Second: to the payment of all taxes which are a lien and payable on said premises at the time of said sale;

Third: to the payment of the first lien in favor of the plaintiff, John Hancock Mutual Life Insurance Company, a corporation;

Fourth: to the payment of the second lien in favor of the defendant, the United States of America, and costs;

Fifth: the balance, if any, to be paid to the person or persons entitled thereto under the direction of the court; [fol. 32] together with accumulated interest on the liens to date of sale; that upon confirmation of the sale of said real estate, as aforesaid, the sheriff of said county shall issue to the purchasers of said real estate at said sale a good and sufficient certificate of purchase as provided by law, and in case said real estate is not redeemed from said sale for a period of eighteen months from the date of sale, as is by law in such cases made and provided, that the sheriff of said county shall thereupon issue and deliver to such purchaser his heirs and assigns, or its successors and assigns, as the case may be, a good and sufficient warranty deed to the said described real estate, as provided by law, and to put such purchaser into full possession of said described real estate, as against said defendants.

It Is Further Ordered, Adjudged and Decreed, that from and after the date of the sheriff's sale, the title and possession of the purchaser at such sale in and to the said real estate is forever quieted against any pretended right, title, interest, estate, lien or claim of the defendants, and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased, the unknown spouses of the defendants, the unknown officers, successors, trustees, creditors and assigns of such defendants as are existing, dissolved or dormant corporations, the unknown executors, administrators, trustees, creditors, successors and assigns of such defendants as are or were partners or in partnership, and the unknown guardians and trustees of such of the defendants as are minors or are in anywise under legal disability; and the said defendants, and each of them, and [fol. 33] all persons claiming by, through or under them, are forever barred and excluded from asserting any title, interest or estate in, lien upon, or claim against the said real estate; except the statutory right of redemption as provided by law.

IN DISTRICT COURT OF EDWARDS COUNTY

Order Approving Sheriff's Sale—February 5, 1958

Now on this 5th day of February, 1958, the same being an adjourned day of the regular October, 1957, term of said court comes the plaintiff, John Hancock Mutual Life Insurance Company, a Corporation, by its attorney, James R. Boyd, and the remaining defendants appearing not, either in person or by attorney, and moves the court to confirm the sale of real estate made by the Sheriff of Edwards County, in the State of Kansas, on the 22nd day of January, 1958, under an Order of Sale issued out of the office of the Clerk of the District Court of said County and State, dated the .... day of December, 1957, and thereupon, upon examination of the order of sale, the publication notice and the proof of publishing the same, together with the return of the sheriff, the court approves the same and finds the proceedings regular and in con-

formity with law and equity, and that such sale should be confirmed.

It is therefore by the Court ordered, adjudged and decreed that the Clerk make an entry upon the journal that the Court finds that said sale has in all respects been made in conformity with law and equity; that such sale should be confirmed and the Sheriff of Edwards County, Kansas, is hereby directed to make to purchaser, John [fol. 34] Hancock Mutual Life Insurance Company, a Corporation, a certificate of sale for the real estate involved herein, fixing the period of redemption at eighteen months from the date of sale.

It is further by the Court ordered that if redemption be not made from such sale within said time that the Sheriff of Edwards County, Kansas, or his successor in office, do make, execute, acknowledge and deliver to the holder of said certificate of sale his sheriff's deed to the following described real estate, to-wit:

> The southeast quarter (SE¼) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter (NW¼) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter (NW¼) of section (23); thence running east 1025 feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence North 1191.5 feet, thence West 1321 feet to the West line of said section twenty-three (23); thence South to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half (N½) of section twenty-three (23); lying South and East of the A., T. & S. F. Railroad; also Lots one (1), two (2); and three (3) in section twenty-four (24) South of Range nineteen (19) west of the sixth principal meridian,

and shall put the holder of said deed in possession of said premises, and the Clerk of this Court is hereby ordered to issue a writ of assistance for that purpose, and the defendants and each and every person claiming by, through [fol. 35] or under them be and they are hereby perpetually enjoined from claiming or asserting any right, title,

interest, estate in or lien upon said premises contrary to the provisions of said Sheriff's Deed and the right of possession of the holder thereof, and that during the period of redemption above named said defendants and all persons claiming by, through or under them be and they are hereby restrained and enjoined from committing or permitting any waste on said premises.

IN DISTRICT COURT OF EDWARDS COUNTY

Motion for Certificate of Redemption

The defendant, United States of America, moves the Court for an Order directing the Clerk to issue it a certificate of redemption for the property which was the subject matter of this action, for the following reasons:

(a) The defendant has made a proper tender to the Clerk in keeping with the provisions of Section 60-3451, General Statutes of Kansas, 1949, and has filed with said tender its affidavit stating the amounts still due on its claim.

(b) The provisions of Title 28, United States Code, Section 2410(c), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption coexistent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein.

State of Kansas, Shawnee County, ss.

Thomas M. Potter, being duly sworn upon oath, states that he is State Director for Kansas of the Farmers Home [fol. 36] Administration, Topeka, Kansas, an agency of the United States of America, and that the United States of America, through the said Farmers Home Administration is the owner and holder of the three judgments rendered in its favor against defendants George Hetzel and Grace Marie Hetzel in the above-entitled action, which

judgments were adjudged to be second liens on the real estate which was the subject of said action to-wit:

The southeast quarter (SE¼) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter (NW¼) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter (NW¼) of section twenty-three (23); thence running east 1025 feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence north 1191.5 feet; thence west 1321 feet to the west line of said section twenty-three (23); thence south to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half (N½) of section twenty-three (23); lying south and east of the A., T. & S. F. Railroad; also Lots one (1), two (2), and three (3) in section twenty-four together with all accretioned land thereto, all in township twenty-four (24) south of Range nineteen (19) west of the sixth principal meridian, in Edwards County, Kansas.

That there is due to the United States of America through its agency, the Farmers Home Administration, upon said judgments the following sums, plus costs, as of this date:

[fol. 37] (a) Against defendants George Hetzel and Grace Marie Hetzel:

$10,639.14 plus additional daily interest from and after June 5, 1958, of $1.2364.

(b) Against the defendant George Hetzel:

1. $573.79 plus additional daily interest from and after June 5, 1958, of $.0376.
2. $1809.14 plus additional daily interest from and after June 5, 1958, of $.1897.

IN DISTRICT COURT OF EDWARDS COUNTY

Journal Entry Overruling Motion for Certificate of Redemption—September 3, 1958

Now on this 3rd day of September, 1958, the same being an adjourned day of the regular May, 1958, term of said Court, the above entitled cause comes on to the court for hearing on the motion of the United States of America for an order directing the clerk of said court to issue to it a certificate of redemption for the real estate heretofore sold in the above entitled action on mortgage foreclosure sale. The United States of America is present by E. Edward Johnson, Assistant United States Attorney for the District of Kansas; the defendant, George Hetzel, is present by his attorneys, John A. Etling and W. N. Beezley, of Kinsley, Kansas.

And now the United States of America, by and through its said Attorney, waives oral argument on its part and submits said motion on its written brief filed herein. And now counsel for the defendant, George Hetzel, are heard orally on said motion, and the court having considered the written brief filed herein on behalf of the United States of America, and having heard the argument of [fol. 38] said counsel for the defendant, George Hetzel, finds that this court is without jurisdiction to grant the relief prayed for and has no jurisdiction of the subject matter of said motion.

Now therefore, it is by the court considered, ordered adjudged and decreed that said motion be and hereby is overruled.

IN DISTRICT COURT OF EDWARDS COUNTY

Notice of Appeal—October 30, 1958

To: John Hancock Mutual Life Insurance Company, a corporation, plaintiff, and James R. Boyd, Larned, Kansas, attorney of record for said plaintiff; George Hetzel and Grace Marie Hetzel, defendants, and John A. Etling, Kinsley, Kansas, attorney of record for said defendants; Bert Lewis and Buck Lewis, defendants, all defendants in the military service, all minor

defendants and all defendants under legal disability, and Rae E. Batt, Kinsley, Kansas, their attorney of record and guardian ad litem; H. F. Thompson, George J. Langfeld, Milton M. Meyer, Donald Meyer, Virgil Ernsting, August Krueger, Marian Koch, Ray W. Revell, Mary Katheryn Barrow, W. L. Rogers, and Edward A. Bortz, defendants and H. F. Thompson, Kinsley, Kansas, attorney of record for said defendants; Hiram T. Burr, Inc., a corporation, defendant, and E. C. Minner and Harry A. Waite, Dodge City, Kansas, attorneys of record for said defendant:

You and each of you are hereby notified that the defendant United States of America does appeal and has appealed to the Supreme Court of Kansas from the judgment and order made and entered in the above entitled cause on September 3, 1958, whereby the motion of the defendant United States of America seeking redemp- [fol. 39] tion of the real property involved in said cause was overruled, the Court finding that it was without jurisdiction to grant the defendant United States of America the relief sought, and that the Court had no jurisdiction of the subject matter of said motion.

Dated October 30, 1958.

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL
(Omitted in Printing)

• • • • •

[fol. 40] IN DISTRICT COURT OF EDWARDS COUNTY

APPLICATION FOR EXTENSION OF TIME FOR FILING ABSTRACT OF RECORD AND NOTICE OF GRANTING THEREOF

Pursuant to Rule No. 8 of this Court, revised as of May 15, 1955, the Appellant, United States of America, hereby applies to the Court for an extension of time of 30 days from and after December 9, 1958, within which to file the abstract of record herein, and shows to the Court that on October 31, 1958, the Notice of Appeal herein was filed

with the Clerk of the District Court of Edwards County, Kansas, appealing from the order and judgment of said Court entered in this cause on September 3, 1958.

It is further shown to the Court that this is not a case in which a transcript of the testimony is necessary to present the questions submitted to this Court; that the office of the Solicitor General of the Department of Justice, Washington, D. C., presently has the case under [fol. 41] consideration relative to the further pursuit of the appeal filed herein, and that the undersigned counsel for the appellant does not anticipate notification from said Solicitor General of a decision relative to further pursuit of this appeal prior to December 9, 1958.

Proof of Service (Omitted in Printing)

• • • •

[fol. 42] OFFICE CLERK SUPREME COURT

Topeka, Kansas, December 13, 1958

Dear Sir:

The Motion by appellant for additional time to file abstract in the case of John Hancock Mutual Life et al., Appellee v. No. 41,429 United States of America, Appellant, is this day allowed.

IN DISTRICT COURT OF EDWARDS COUNTY

Application for Additional Extension of Time for Filing Abstract of Record and Notice of Granting Thereof

Pursuant to Rule No. 3 of this Court, revised as of May 15, 1955, the Appellant, United States of America, hereby applies to the Court for an additional extension of time of 30 days from and after January 5, 1959, within which to file the abstract of record herein, and shows to the Court that on October 31, 1958, the Notice of Appeal [fol. 43] herein was filed with the Clerk of the District Court of Edwards County, Kansas, appealing from the order and judgment of said Court entered in this cause on September 3, 1958.

It is further shown to the Court that this is not a case in which a transcript of the testimony is necessary to

present the questions submitted to this Court; that the office of the Solicitor General of the Department of Justice, Washington, D. C., presently has the case under consideration relative to the further pursuit of the appeal filed herein, and that the undersigned counsel for the appellant does not anticipate notification from said Solicitor General of a decision relative to further pursuit of this appeal prior to January 3, 1959.

PROOF OF SERVICE (Omitted in Printing)

• • • •

[fol. 44] OFFICE CLERK SUPREME COURT

Topeka, Kansas, January 16, 1959

Dear Sir:

The Motion for additional time to file abstract by appellant, in the case of John Hancock Mutual Life Insur-[fol. 45] ance Company, Appellee v. No. 41,429 United States of America, Appellant is this day allowed.

• • • •

IN DISTRICT COURT OF EDWARDS COUNTY

SPECIFICATION OF ERROR

The District Court erred in denying appellant's motion for an order directing the Clerk to issue to it a certificate of redemption for the property which is the subject matter of this mortgage foreclosure action, which motion was made on the ground that 28 U. S. C. 2410(c) accords appellant a right of redemption co-existent with that accorded appellees George and Grace Marie Hetzel under Section 60-3440, General Statutes of Kansas, 1949, and in holding that it was "without jurisdiction to grant the relief prayed for and (had) no jurisdiction of the subject matter of said motion."

[fol. 46] No. 41,429

IN THE
SUPREME COURT OF THE STATE OF KANSAS

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation, APPELLEE

vs.

GEORGE HETZEL; GRACE MARIE HETZEL; H. D. TAYLOR; AMY F. TAYLOR; BERT LEWIS; BUCK LEWIS; W. E. ROSTINE, WM. P. ROSTINE, BOYD L. ROSTINE; and all persons who are or were doing business under th name of THE HUTCHINSON CONCRETE COMPANY; THE HOME LUMBER AND SUPPLY COMPANY, INC., a Corporation; HIRAM T. BURR, INC., a Corporation; A. A. DOERR MERCANTILE COMPANY, a Corporation; SARAH J. STOUT; CATHERINE M. BOSTWICK; W. L. ROGERS; MARIAN KOCH; H. F. THOMPSON; GEORGE J. LANGFIELD; MILTON M. MEYER; DONALD MEYER; VIRGIL ERNSTING; AUGUST KRUEGER; ROY W. REVELL; MARY CATHERINE BARROW; and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown officers, successors, trustees, creditors and assigns of such defendants as are existing, dissolved, or dormant corporations; the unknown executors, administrators, trustees, creditors, successors and assigns of such defendants as are or were partners or in partnership; and the unknown guardians and trustees of such of the defendants as are minors or are in any wise under legal disability; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EDWARDS, APPELLEES

and

THE UNITED STATES OF AMERICA, APPELLANT

STIPULATION OF COUNSEL RE REAL ESTATE MORTGAGE FOR KANSAS, SPECIAL LIVESTOCK LOAN WITH ATTACHMENT—Filed May 15, 1959

It is hereby stipulated and agreed by and between counsel for the parties to the above appeal that the at-

tached photostatic copies of the document entitled "United States Department of Agriculture—Farmers Home Administration—Real Estate Mortgage For Kansas—Livestock Loan", is a true and accurate copy of the real estate mortgage declared upon by the United States of America acting through the Farmers Home Administration, in its cross petition in the above entitled cause and that the same be and hereby is made a part of the record in [fol. 47] the above entitled Appeal, for consideration of the Court in this cause.

Dated at Topeka, Kansas, this 14th day of May, 1959.

/s/ E. Edward Johnson
Attorney for Appellant.

/s/ Barton E. Griffith

/s/ John A. Etling
Attorneys for Appellees.

Attachment to Stipulation

Form FHA 76-16
Rev. 2-7-

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION

REAL ESTATE MORTGAGE FOR KANSAS

SPECIAL LIVESTOCK LOAN

KNOW ALL MEN BY THESE PRESENTS:

THAT, WHEREAS, the undersigned GEORGE HETZEL and GRACE MARIE HETZEL, his wife, of the County of Edwards, State of Kansas, hereinafter called Mortgagor, have become justly indebted to the United States of America, acting through the Administrator of the Farmers Home Administration, hereinafter called Mortgagee, whose post office address for the purpose of this instrument is Farmers Home Administration, Department of Agriculture, St. John, Kansas, for the sum of Ten Thousand Five Hundred Sixty-five and No/100- dollars ($10,565.00- -), the balance of unpaid principal remaining upon loan made to the Mortgagor, with interest now due or to become due at the rate per annum indicated below, which debt is evidenced by a promissory note dated as indicated below, executed by the Mortgagor to the Mortgagee, or other payee indicated therein and now held by the Mortgagee, and payable in one or more installments, said note being described as follows:

DATE	PRINCIPAL AMOUNT	INTEREST RATE	LAST INSTALLMENT DUE
September 4, 1953	$10,565.00	5 %	September 1, 1956
, 19	$	%	, 19
, 19	$	%	, 19
, 19	$	%	, 19
, 19	$	%	, 19
, 19	$	%	, 19
, 19	$	%	, 19

which note is payable at the office of the Farmers Home Administration, Department of Agriculture, St. John, Kansas, and any future or additional sum or sums not exceeding the aggregate amount of ________ dollars ($________), loaned to the Mortgagor by the Mortgagee for any purpose, with interest at a rate not in excess of five percent (5%) per annum; and

WHEREAS, Mortgagor is desirous of securing the prompt payment of said note, and the several installments of principal and interest at maturity, and any extension or renewal thereof, and any agreement supplementary thereto, and any additional indebtedness accruing to Mortgagee on account of any future advances or expenditures made as hereinafter provided, and the performance of each and every covenant and agreement of Mortgagor herein contained;

NOW THEREFORE, in consideration of the said indebtedness and to assure the prompt payment thereof, as the same matures or becomes due, and of any extension or renewal thereof, or of any agreement supplementary thereto, and to assure the performance of each and every covenant and agreement of Mortgagor herein contained, Mortgagor does hereby and with these presents mortgage and warrant unto Mortgagee the following described real estate situated in the County of Edwards, State of Kansas, to wit:

The Southeast Quarter (SE¼) of SECTION TWENTY-TWO (22), Township Twenty-four (24) South, Range Nineteen (19) West of the Sixth Principal Meridian; and

Forty-five acres (45A.) in the Southwest Corner of the Northwest Quarter (NW¼) of SECTION TWENTY-THREE (23), Township Twenty-four (24) South, Range Nineteen (19) West of the Sixth Principal Meridian; and

One Hundred Seventy-four acres (174A.) all East of the Santa Fe Railway right of way in the North One-half (N½) of SECTION TWENTY-THREE (23), Township Twenty-four (24) South, Range Nineteen (19) West of the Sixth Principal Meridian; and

One Hundred Thirty-six acres (136A.) in the Northwest Quarter (NW¼) of SECTION TWENTY-FOUR (24), Township Twenty-four (24) South, Range Nineteen (19) West of the Sixth Principal Meridian;

(2)

SUBJECT TO Mortgage in the amount of $25,000.00 in favor of The John Hancock Company.

together with all rents and other revenues or incomes therefrom, and all and singular rights, easements, hereditaments, and appurtenances thereunto belonging and all improvements and personal property now or hereafter attached to the real property herein described, all of which property is sometimes hereinafter designated as "said property".

TO HAVE AND TO HOLD said property unto Mortgagee and its assigns forever.

AND MORTGAGOR, for himself, his heirs, executors, administrators, successors, and assigns, does hereby and by these presents covenant and agree

1. To use the proceeds of the loan secured hereby solely for the purposes authorized by the Mortgagee.

2. To pay promptly all installments of principal and interest as they become due according to the terms of the said promissory note, and of any agreements supplementary thereto, and any other indebtedness owing by the Mortgagor to the Mortgagee and secured hereby.

3. To pay, before the same shall become delinquent, all taxes, assessments, levies, liabilities, obligations and encumbrances of every nature whatsoever which affect said property or the Mortgagee's rights and interest therein under this mortgage or the indebtedness hereby secured, and promptly to deliver to Mortgagee, without demand, receipts evidencing such payments.

4. Immediately upon the execution of this mortgage to provide, and thereafter continuously maintain, fire insurance policies and such other insurance policies as Mortgagee may then or from time to time require upon the buildings and improvements now situated or hereafter constructed in or upon said property, each such policy to contain a mortgage clause in which the Mortgagee is named as beneficiary. Said fire and other insurance policies shall be deposited with the Mortgagee, if required by the Mortgagee, and shall be with companies, in amounts and on terms and conditions approved by Mortgagee.

5. At all times to maintain said property in proper repair and good condition; to commit or suffer no waste or exhaustion of said property.

6. That the Mortgagee, its agents and attorneys, shall have the right at all times to inspect and examine said property for the purpose of ascertaining whether or not the security given is being lessened, diminished, depleted or impaired, and if such inspection or examination shall disclose, in the judgment of the Mortgagee that the security given or property mortgaged is being lessened or impaired, such condition shall be deemed a breach of the covenants of the mortgage on the part of the Mortgagor.

7. To perform, comply with and abide by each and every stipulation, agreement, condition and covenant in said promissory note, and in any extensions or renewals thereof, and in any agreement supplementary thereto, executed by Mortgagor on account of said indebtedness, and in this mortgage contained.

8. To comply with all laws, ordinances and regulations affecting said property or its use.

9. That the Mortgagor shall give the Mortgagee additional security for the indebtedness hereinbefore described at such times as the Mortgagee shall so request.

10. That all of the terms and provisions of the note which this mortgage secures, and of any extension or renewal thereof, and of any agreement supplementary thereto, executed by Mortgagor on account of said indebtedness, are hereby incorporated in and made a part of this mortgage as if the same were set out in full herein, and will be construed with said mortgage as one instrument.

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11. That all awards of damages up to the amount of the indebtedness of Mortgagor to Mortgagee [illegible] with any condemnation for public use of or injury to any of said property are hereby assigned and shall be paid to Mortgagee who may apply same to payment of the installments last to become due under said note, and Mortgagee is hereby authorized, in the name of Mortgagor, to execute and deliver valid acquittances therefor and to appeal in the name of Mortgagor or Mortgagee from any such award.

12. That, without in any manner affecting the right of Mortgagee to require and enforce performance at a subsequent date of the same, similar or any other covenant, agreement or obligation herein set forth, and without affecting the liability of any person for payment of any indebtedness secured hereby, and without affecting the lien created upon said property or the priority of said lien, Mortgagee is hereby authorized and empowered at its option and at any time to (1) waive the performance of any covenant or obligation herein or in said note contained, (2) deal in any way with Mortgagor or grant to Mortgagor any indulgence or forbearance or extension of the time for payment of any indebtedness hereby secured, and (3) execute and deliver partial releases of any part of said property from the lien hereby created.

13. That wherever the context hereof requires, the masculine gender as used herein shall include the feminine and the neuter, and the singular number as used herein shall include the plural, and vice versa.

14. That if advances are made or expenses incurred by the Mortgagee which become an additional amount due to Mortgagee under the terms of this instrument, any payments received by Mortgagee hereunder after such advances or expenses become due shall be applied, first, to the payment of such advances or expenses with interest thereon at the same rate as that specified in the latest note secured hereby until paid; PROVIDED, HOWEVER, that any payment made to Mortgagee during the continuance of any default hereunder may be applied to the extinguishment of any indebtedness hereby secured in such order as Mortgagee may determine, notwithstanding any provision to the contrary herein or in said note contained.

15. That Mortgagor will record this mortgage at his expense in the office of the Register of Deeds in the county in which the real estate covered by this mortgage is situated.

16. That should Mortgagor assign, sell, lease, transfer or encumber said property or any interest therein, voluntarily, involuntarily, or otherwise, or should he abandon said property or become an incompetent or be declared a bankrupt or an insolvent or make an assignment for the benefit of creditors, or fail to keep, perform and comply with any covenant, warranty or condition in this instrument contained or referred to, without the consent of Mortgagee, or upon the death of Mortgagor, Mortgagee may declare the amount unpaid immediately due and payable and thereupon exercise any remedy provided herein or by law.

17. That any notice, consent or other act to be given or done by the Mortgagee under this mortgage shall be valid only if in writing and executed or performed by the Administrator of the Farmers Home Administration or his duly authorized representative.

18. That all notices to be given under this mortgage shall be delivered or forwarded by registered mail, addressed in the case of the Mortgagee to Farmers Home Administration, Department of Agriculture, at

Topeka, Kansas

____, and in the case of the Mortgagor to him at the post office address of the real estate covered by this mortgage.

19. That Mortgagor does hereby authorize and empower Mortgagee (1) to take possession of said property at any time there is any default in the payment of the debt hereby secured or in the performance of any obligation herein contained, and to rent the same for the account of Mortgagor and (2) upon commencement of any proceedings, judicial or otherwise, to enforce any right under this mortgage, to have a Receiver for said property appointed by a court of competent jurisdiction, upon application by Mortgagee and production of this mortgage, without other evidence and without notice of hearing of said application; which Receiver shall have, among other things, full power to rent, lease and operate said property and collect all rents, profits and other revenues therefrom during said default and the period of redemption. All rents, profits and other revenues collected as herein provided by either the Mortgagee or the Receiver shall be applied, after deduction of all costs of collection and administration, upon the mortgage debt in such manner as the Mortgagee or the court may direct; Provided, however, that if the Mortgagor be in default in the payment of any other debt to Mortgagee not secured by this mortgage, Mortgagee or Receiver may apply the rents, profits and other revenues hereby collected to the reduction of same.

20. That all rights, privileges, benefits, obligations and powers herein conferred on the Mortgagee may be exercised on behalf of the Mortgagee by the Secretary of Agriculture, the Administrator of the Farmers Home Administration, or by the head of any other agency of the Federal Government that may from time to time be vested with authority over the subject matter of this contract or his duly authorized representatives.

21. THAT TIME IS OF THE ESSENCE of this mortgage and of the note and other instruments herein referred to, AND SHOULD DEFAULT be made in the payment [illegible] secured hereby, of any installment due under said note, or under any extension or renewal thereof, or under any agreement supplementary thereto, or should Mortgagor fail to keep or perform any covenant, condition, or agreement herein contained or referred to, or if the Mortgagor should apply the proceeds of this loan to substantially different purposes from those for which it was obtained, or if any representations herein made by the Mortgagor prove false in any respect, or in the event of the actual bankruptcy or of the insolvency of the Mortgagor, or if any of the property subject to the lien hereof is attached, levied upon, or for any reason taken possession of by any person other than the Mortgagee, or if the Mortgagor abandons any of said property, or if for any reason the Mortgagee should deem itself insecure, then in any of said events Mortgagee is hereby irrevocably authorized and empowered, at its option and without notice and without affecting the lien hereby created or its priority or any right of Mortgagee hereunder (1) to inspect and repair said property and to incur any reasonable expense in the maintenance of said property, including the payment of taxes, insurance premiums, and any other necessary costs and expenditures for the preservation and protection of this lien, (2) to declare the entire indebtedness herein secured immediately due and payable and to foreclose this mortgage in the manner hereinafter set out, and (3) to pursue any remedy for it by law provided; PROVIDED, HOWEVER, that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power, or remedy of Mortgagee, whether herein set out or conferred by law, and

[fol. 51]

(4)

may be enforced concurrently therewith. All moneys advanced or expended by Mortgagee as herein provided, including costs of evidence of title to and survey of said property, reasonable attorney's fees, court costs and other expenses incurred in enforcing the provisions hereof, with interest at the same rate as that specified in the note secured hereby until repaid, shall become a part of the indebtedness herein secured and shall be payable by Mortgagor to Mortgagee as herein provided, as part of the principal obligation, immediately after such expenditure and without demand, in lawful money of the United States, at the place heretofore specified, or at such other place as Mortgagee may designate.

22. That Mortgagee may foreclose this mortgage by action in a court of competent jurisdiction in accordance with the laws existing at the time of the commencement thereof, and said property may be sold on terms and conditions satisfactory to Mortgagee.

23. That, should this said property be sold under foreclosure, (1) Mortgagee or its agent may bid at such sale and purchase said property as a stranger; (2) Mortgagor will pay all costs, fees and other expenses incurred in connection therewith, and (3) Mortgagor does hereby expressly waive, to the extent permitted by law, the benefits of all homestead, dower, exemption, valuation, appraisement, stay and moratorium laws of the State of Kansas now in force or which may hereafter become laws, and the rights of possession of the mortgaged property during the period of redemption.

24. That application of the proceeds of the sale shall be made in the following order: (1) to the payment of the cost of foreclosure, including expenses of advertising, selling and conveying said property, abstract of title, court costs and other expenses incident and necessary thereto; (2) to the payment of any amounts that shall have been expended by the Mortgagee or that may then be necessary to expend in the payment of insurance premiums, taxes or other expenditures as herein provided, with interest thereon as aforesaid; (3) to the payment in full of the note herein secured, whether the same shall or shall not have fully matured at the time of said sale; (4) to the payment of secondary liens duly approved and allowed by the court; and (5) the balance, if any, shall be delivered to the Mortgagor.

25. That neither said property nor any interest therein will be assigned, sold, transferred, voluntarily or otherwise, without the consent of the Government.

26.

STATE OF KANSAS, EDWARDS COUNTY } SS

Given under our hand s and seal s this 22nd day of October, 1953

Kinsley, Kansas (Mail Address) — George Hetzel — George Hetzel (Husband) (SEAL)

Kinsley, Kansas (Mail Address) — Grace Marie Hetzel — Grace Marie Hetzel (Wife) (SEAL)

ACKNOWLEDGMENT

State of Kansas }
County of EDWARDS } ss:

On this 22nd day of October, A. D. 1953 before me the undersigned, a Notary Public in and for said County and State, personally appeared GEORGE HETZEL and GRACE MARIE HETZEL, husband and wife, to me personally known and known to me to be the same person(s) who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed.

Myrtle H Richardson
Notary Public

(SEAL)

My commission expires Sept 6, 1954

Ending lines to be inserted when mortgage secures a loan to a man and his sister.

[fol. 52] (File Endorsement Omitted)

[fol. 53] IN SUPREME COURT OF KANSAS

No. 41,429

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLEE

v.

GEORGE HETZEL, GRACE MARIE HETZEL, ET AL., APPELLEES and THE UNITED STATES OF AMERICA, APPELLANT

OPINION—July 10, 1959

SYLLABUS BY THE COURT

1. MORTGAGES—*Foreclosure—Certificate of Purchase to First Mortgagee—Motion for Redemption Certificate Overruled.* In a foreclosure suit the trial court decreed foreclosure of an insurance company's first mortgage and the government's second mortgage executed by the same mortgagors on the same parcel of real property located in Edwards county. At the sheriff's sale the insurance company, the only bidder, received a certificate of purchase in its favor for the amount due under the decree of foreclosure. As is more fully set out in the opinion, the government attempted to redeem the property in the first year after the sheriff's sale but its motion for an order of the trial court directing the clerk of the court to issue it a redemption receipt was overruled. *Held,* the trial court did not err in overruling the government's motion.

2. SAME—*Foreclosure—Redemption by Mortgagors.* Under the facts and circumstances set out in paragraph 1 above and subsequent to the attempt of the government to redeem the property, the mortgagors paid the necessary amount to redeem within twelve months after the sheriff's sale, and it is further *held,* the trial court did not err in ordering the clerk to issue a redemption receipt to the mortgagors.

[fol. 54]. 3. Trial—*Findings—Conclusiveness.* It is the general duty of a court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment are not conclusive in other actions.

4. Mortgages—*Foreclosure Decree Not Determinative of Redemption Rights.* In a factual situation such as is stated in paragraph 1, the mortgage foreclosure decree did not determine the redemption rights of the mortgagors under state and federal statutes (G. S. 1949, 60-3440, *et seq.*; 28 U. S. C. § 2410) and the trial court had jurisdiction to determine those rights at a subsequent term.

5. Conflict of Laws—*Effect of State Law on Government.* "A state law affecting the title to property must be followed and is binding upon the United States." (*United States* v. *Ryan*, 124 F. Supp. 1.)

6. Mortgages—*Priority of Federal Statutes.* If the federal government is entitled to a priority, as is more fully shown in the opinion, it must be based on some statutory enactment but the federal statute (28 U. S. C. § 2410) is not mandatory. It merely waives sovereign immunity in suits to foreclose mortgages; it does not attempt to give priority in all cases to liens created under the paramount authority of the federal government. (*United States* v. *Cless*, 150 F. Supp. 687, 690.)

7. Same—*Government Lien—Dependency on State Laws.* In a case concerning a lien of the federal government under a second mortgage created in the course of an ordinary business transaction of an agency of the government, as to which there is no federal statutory provision conferring upon it any particular sanctity, the government is entirely dependent upon state laws both as to its position and enforcement. (*United States* v. *Cless*, *supra*, pp. 687, 692.)

8. Same—*Rights of Government Stated.* Nothing in the federal statute (28 U. S. C. § 2410) gives the federal government rights superior to those enjoyed by private citizens; a federal agency is to be governed by the

same local law which controls the rights of private citizens in a similar endeavor. (*United States* v. *Cless*, 254 F. 2d 590, 593, 594.)

9. SAME—*Sheriff's Sale—Government's Right to Bid.* In our present case the government had the authority and power to bid at the sheriff's sale the same as any private citizen in its position whereby its rights would have been protected.

Appeal from Edwards district court; LORIN T. PETERS, judge. Opinion filed July 10, 1959. Affirmed.

Morton Hollander, of Washington, D. C., argued the cause, and *George Cochran Doub*, assistant attorney general, *Wilbur G. Leonard*, United States attorney, *E. Edward Johnson*, assistant United States attorney, and *William A. Montgomery*, of Washington, D. C., were with him on the briefs for the appellant.

John A. Etling, of Kinsley, and *Barton E. Griffith*, of Topeka, argued the cause, and *W. N. Beezley*, of Kinsley, was with them on the briefs for the appellees, George Hetzel and Grace Marie Hetzel.

[fol. 55] The opinion of the court was delivered by

ROBB, J.: The John Hancock Mutual Life Insurance Company, hereafter referred to as the insurance company, on September 3, 1957, filed the original suit herein to recover judgment on its note and foreclose its first mortgage lien on real property in Edwards county belonging to George Hetzel and Grace Marie Hetzel, hereafter referred to as mortgagors, who had executed a note and mortgage as security therefor. Another defendant and the appellant here, the United States of America, hereafter referred to as the government, is also holder of notes and a second mortgage, as security for one of the notes, executed by the same mortgagors on the same real property. In this appeal we are not concerned with other defendants of record or their claims. No dispute exists as to the priority of the mortgages nor as to the pleadings and we shall therefore refer only to the pertinent parts thereof as we proceed with our discussion of the points at issue.

On December 4, 1957, the trial court entered judgment on the respective notes and foreclosed the first mortgage in favor of the insurance company and the second mortgage in favor of the government. The decree further provided that if the mortgagors failed to pay the judgments within ten days, the sheriff of Edwards county was directed to advertise and sell the real property according to law subject to redemption for a period of eighteen months after the date of sale. The proceeds were to be applied on costs, taxes, on the first lien of the insurance company and then on the government's second lien.

The mortgagors failed to pay within ten days and on January 22, 1958, the sheriff's sale was held. The only bidder was the insurance company which bid the property in for the full amount of its judgment, interest, taxes and costs. The government did not bid at the sheriff's sale. The insurance company was the only party who appeared to move for the court's confirmation order of the sheriff's sale. On February 5, 1958, the trial court confirmed the sale and directed the sheriff to issue to the purchaser a certificate of sale for the real property, fixing the period of redemption at eighteen months from the date of sale. If redemption were not made within time, the sheriff was directed to make, execute and deliver to the holder of said certificate his sheriff's deed to the real property and put the holder thereof in possession.

[fol. 56] On June 5, 1958, the government requested the district court clerk to issue a certificate of redemption to it pursuant to its tender under G. S. 1949, 60-3451. The amount thereof was to be measured by the *lex rei sitae* (normal state-law rule) to effectuate its right to redeem the property under 28 U. S. C. 2410(c), which section is appended hereto. This request was declined by the clerk and in a letter dated July 8, 1958, the district court, in brief, informed the government that the holder of the certificate of purchase and the mortgagors questioned the government's right to redeem the real property at that time and consequently the clerk would not issue the redemption certificate until the court so ordered. The letter further stated the court would be on vacation until Sep-

tember but it presumed the government would want to file a motion raising the question and would serve opposing counsel and have the motion set for hearing.

On July 23, 1958, the government filed its motion seeking an order of the district court directing the clerk to issue a certificate of redemption to it, alleging that:

"(*a*) The defendant has made a proper tender to the Clerk in keeping with the provisions of Section 60-3451, General Statutes of Kansas, 1949, and has filed with said tender its affidavit stating the amounts still due on its claim.

"(*b*) The provisions of Title 28, United States Code, Section 2410 (*c*), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein.".

Another portion of the motion contained the affidavit referred to in (a) above.

On September 3, 1958, during a hearing on the government's motion, the mortgagors contended the trial court was without jurisdiction to grant the relief sought in the government's motion. The trial court so found and in its order overruling the motion on the same day stated:

". . . this court is without jurisdiction to grant the relief prayed for and has no jurisdiction of the subject matter of said motion."

The government timely perfected the instant appeal from the above order and raises two questions.

1. Did the trial court err in denying the government's motion made on the ground that 28 U. S. C. 2410 (c) accords the government a co-existence redemption right with that of the mortgagors under G. S. 1949, 60-3440?

2. Did the trial court have jurisdiction over the subject matter of the motion and to grant the relief prayed for?

[fol. 57] On January 14, 1959, the mortgagors redeemed the property and were issued a certificate of redemption by the clerk of the court.

As is customary, we will proceed to the determination of the jurisdictional question, if one there be, before reaching the first question raised by the government.

The foreclosure decree entered on December 4, 1957, and the order of confirmation of sheriff's sale on February 5, 1958, occurred during the term of court beginning on the fourth Monday of October, 1957, the next term began on the second Monday of February, 1958, and the government's request of the court clerk for a redemption certificate made on June 5, 1958, was in the term of that court which began on the first Monday of May, 1958. The motion, as above stated, was filed on July 23, 1958, which means that two terms of court in the thirty-third judicial district including Edwards county (G. S. 1949, 20-1029a) had expired from the time of the trial court's decree and order on December 4, 1957, and the government's demand on the court clerk and motion addressed to the trial court on July 23, 1958.

The mortgagors contend that a trial court loses jurisdiction over its judgment after the expiration of the term in which a judgment is rendered absent the exceptions provided for in G. S. 1949, 60-3007, which are not present here. The contention is too far-reaching. The controlling rule of law as to jurisdiction after term was stated in *Keys* v. *Smallwood*, 152 Kan. 115, 102 P. 2d 1001.

> "Rule followed that a judgment cannot be set aside, modified or in anywise affected after the term at which it is rendered except as provided by the civil code." (Syl. ¶ 1.)

However, the Keys case was a garnishment proceeding and is not applicable in our present case.

Other authorities cited by the mortgagors are somewhat similar to the overall picture presented by our present case but they are distinguishable as to the question under consideration and, therefore, are not determinative thereof.

The government calls our attention to *Johnson* v. *Wear*, 110 Kan. 237, 204 Pac. 141, wherein (p. 243) *Mitchell* v.

Insley, 33 Kan. 654, 657, 7 Pac. 201, was cited. The Mitchell case involved an original ejectment action where a deed was determined to constitute a mortgage to secure a payment of $2,000 and the mortgagee had a lien upon the land but it was further determined his remedy was not by ejectment. Subsequently the mortgagee filed a [fol. 58] mortgage foreclosure suit wherein the amount due under the mortgage was in issue. (p. 658.) The court stated that the amount due on the mortgage in the ejectment action was wholly immaterial, that the adjudication the deed was a mortgage was conclusive, and perhaps that *something was due*, but not the amount. The question of the amount due, therefore, remained undetermined. Justice Marshall in the Johnson case (p. 243) quoted the following language from page 657 of the Mitchell case:

> "'It is the general duty of the court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment.'"

The Mitchell case was also cited in *Landon* v. *Clark*, 221 Fed. 841, 845.

The only provision of the decree of foreclosure pertaining to redemption reads:

> ". . . and in case said real estate is not redeemed from said sale for a period of eighteen months from the date of sale, as is by law in such cases made and provided. . . ."

By reason of the foregoing, the trial court obviously did not fully determine the redemption rights of the mortgagors as against the government, or *vice versa*, except by the general language of the phrase, ". . . as is by law in such cases made and provided." The redemption rights of the mortgagors under our state statutes (G. S. 1949, 60-3440, *et seq.*) were therefore covered as were also the government's redemption rights under 28 U. S. C. § 2410. Expressed in another way, the trial court, by

using the language quoted above, of necessity ruled that all questions regarding the redemption of the real property here involved would be governed by both state and federal law.

We believe the trial court intended to subject the redemption questions to both state and federal law and that it made clear such intention when ruling on the government's motion by use of the following language:

> "Now therefore, it is by the court considered, ordered adjudged and decreed that said motion be and hereby is overruled."

What other possible construction can be given this order? The motion was neither dismissed nor stricken, but was ruled upon, and in view of what has herein been said and the authorities relied on by the government in support of its contention that the trial court did have [fol. 59] jurisdiction of the subject matter, we can only conclude the trial court had, and exercised, authority to determine the rights of redemption "as is by law in such cases made and provided," as well as the power to grant or deny the relief prayed for in the motion by the government.

Determination of the second question requires that we set out a part of the mortgage executed by the mortgagors to the government. The form contained the following heading:

> "United States Department of Agriculture
> "Farmers Home Administration
> "REAL ESTATE MORTGAGE FOR KANSAS
> "Special Livestock Loan"

Section 21 of the mortgage contained these provisions:

> "THAT TIME IS OF THE ESSENCE of this mortgage and of the note . . . AND SHOULD DEFAULT be made in the payment of the note secured hereby, or any installment due under said note . . . or for any reason the Mortgagee should deem itself insecure, then in any of said events Mortgagee is hereby irrevocably authorized and empowered . . . (1) to inspect and repair said property . . . (2) to declare the entire

indebtedness herein secured immediately due and payable and to foreclose this mortgage in the manner hereinafter set out, and (3) to pursue any remedy for it by law provided; PROVIDED, HOWEVER, that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power, or remedy of Mortgagee, whether herein set out or conferred by law. . . ."

Section 22 in part provided:

"That Mortgagee may foreclose this mortgage by action in a court of competent jurisdiction in accordance with the laws existing at the time of the commencement thereof. . . ."

Section 23 in pertinent part reads:

"That, should this said property be sold under foreclosure (1) Mortgagee or its agent may bid at such sale and purchase said property as a stranger: (2) Mortgagor will pay all costs . . . (3) Mortgagor does hereby expressly waive, *to the extent permitted by law* the benefits of all homestead, dower, exemption valuation, appraisement, stay and moratorium *laws of the State of Kansas* now in force or which may hereafter become laws, and the rights of possession of the mortgaged property during the period of redemption." (Our emphasis.)

The mortgagors base their contentions primarily on G. S. 1949, 60-3440 as follows:

"For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendand owner whose demand is a lien upon such real estate may redeem the same at any time within
[fol. 60] fifteen months from the date of sale. A mechanic's lien, before decree enforcing the same, shall not be deemed such a lien as to entitle the holder to redeem."

The government places its reliance on 28 U. S. C. § 2410, which is hereto appended in full, but more particularly it relies on subsection (c) thereof, as follows:

> "Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem."

Mortgagors referred to other statute involving redemption. Some of them are of little, if any, help in the determination of this appeal. Briefly stated, those that are pertinent here provide that after the issuance of the certificate to the purchaser at the sheriff's sale (G. S. 1949, 60-3438), the mortgagors could redeem the real property at any time within eighteen months from the day of sale (60-3439); for the first twelve months after the day of sale the mortgagors had the exclusive right to redeem but if at the end of that time they had not done so, any lien creditor could redeem within fifteen months from the date of sale (60-3440); after the expiration of the fifteen months, the mortgagors could still redeem at any time before the end of the eighteen months, but the creditors could not. (60-3447.) The mortgagors could assign or transfer their rights of redemption whereby those same rights would pass to an assignee or transferee. (60-3455.) See *Union Central Life Ins. Co.* v. *Reser*, 134 Kan. 876, 8 P. 2d 366, for further discussion of some of our redemption statutes.

The sovereign immunity of the government from suit without the express mandate of the Congress to the contrary, by waiver or granting permission for such suit or suits, is of sufficient general knowledge that a full legal discussion thereof would be surplusage.

Neither can there be any argument with the government's contention that federal laws are supreme over state laws where a conflict exists between them such as occurred in an action in a state court to recover statutory penalties for violation of the emergency price control act. (*Testa* v. *Katt*, 330 U. S. 386, 67 S. Ct. 810, 91 L. ed. 967.) The same is true where there were labor disputes involving interstate or foreign commerce. (*Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 58 S. Ct. 459, 82 L. ed. 638.)

The Supreme Court of the United States has not been hesitant in cases involving diversity of citizenship to [fol. 61] remand them for determination by the federal circuit court under state laws. For example, *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1189, was an action concerning tort liability and involved application of state laws by the federal circuit court.

In *United States v. Ryan,* 124 F. Supp. 1, the Minnesota Torrens system as it related to the filing of federal tax liens was comprehensibly explained and it was held that the government failed to comply with the procedural requirements of the state law whereby its lien for taxes was lost. We cannot repeat all that was said in the Ryan case, as to do so would unduly extend this opinion, but the following statements therefrom are of significant consequence herein:

> "The United States is not exempt from the provisions of the state statutes. The laws of the United States definitely provide that the tax lien here asserted will not become a valid lien unless notice thereof is filed as by state law prescribed. A state law affecting the title to property must be followed, and is binding upon the United States." (p. 10.)
>
> "At any time, however, up to the time of the foreclosure of the prior mortgage held by Minnesota Federal Savings and Loan Association, the plaintiff could have perfected its lien by filing the notice as by statute required. The foreclosure of the mortgage and the expiration of the period of redemption has now precluded plaintiff from so doing. The mortgage contained a power of sale. Under the laws of the State of Minnesota, a mortgage containing a power of sale may be foreclosed by advertisement. There is nothing in the United States Code which precludes a foreclosure by advertisement. 28 U. S. C. A. § 2410 provides that in any action to foreclose a mortgage the United States *may* be joined as a party defendant. But there is nothing in this section, or in any section of the United States Code, which prohibits a foreclosure under a power of sale or which provides that the United States will not be bound thereby. The

Minnesota Federal Savings and Loan Association was entitled to foreclose by advertisement, and the plaintiff, and all other parties interested in the property, is bound by the foreclosure. This exact question was before the Court in the case of Trust Co. of Texas v. United States, D. C., 3 F. Supp. 683, and the Court held that a mortgage foreclosure under power of sale extinguishes not only the rights of the owner in the property sold, but all subsequent and inferior liens thereon, *including the lien of the United States.* Therefore, in the instant case, the foreclosure divested the interest of the registered owner, Kenneth Ryan, and the rights of all parties claiming under or through him, including the plaintiff here." (pp. 10-11.)

A case more analogous to our present one is *United States* v. *Cless,* 150 F. Supp. 687, where a first mortgagee had obtained a writ of *fieri facias* and later bid in and purchased the mortgaged property at the sheriff's sale. He then sold the property to another but title had not yet passed. [fol. 62] The government was seeking foreclosure of its second mortgage and the question was whether the second mortgage lien was divested by the sheriff's sale in the light of 28 U. S. C. § 2410. In rendering summary judgment against the government, the district court there said:

"At the time the agency [the government] made this loan and entered its mortgage it had notice that its mortgage was second in lien to a first mortgage held by an individual entered over a year prior thereto.

"The mortgagors defaulted on their first mortgage. The mortgagee foreclosed and bought in the property at the Sheriff's sale on his bid of the costs of the sale. Had the second mortgagee been an individual there is no question but that the lien of the second mortgagee would have been extinguished by the foreclosure on the first mortgagee. Is the situation changed because the United States happens to be the second mortgage holder?

"The Government leans heavily on 28 U. S. C. § 2410 (a), above cited. This statute is not mandatory,— it merely waives sovereign immunity in suits to fore-

close mortgages or quiet titles. Haldeman v. United States, D. C. E. D. Mich., 93 F. Supp. 889. In other words, the purpose of this statute in which the United States consents to be named a party in an action which seeks an adjudication touching any mortgage or other lien of the United States is merely to waive sovereign immunity from suit in certain types of cases. Wells v. Long, 9 Cir., 162 F. 2d 842.

"If the United States is entitled to a priority in this case it must be based on some statutory enactment. '. . . the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States.'" (pp. 689-690.)

The court therein further stated:

"I find no evidence of a Congressional sensitivity in relation to claims of the Government predicated on loans made to individuals by various governmental agencies comparable to that evidenced in relation to tax claims, and for the very obvious reason that the latter deals, as above indicated, with a matter of public policy,—the collection of taxes to enable the Government to function. Certainly what was said in the Ryan case, supra, is pertinent in connection with the problem presented in this case concerning the lien of the United States under a second mortgage created in the course of an ordinary business transaction of an agency of the United States, as to which there is no federal statutory provision conferring any particular sanctity, and which, therefore, is dependent entirely both as to its position and enforcement upon State laws." (p. 692.)

The Cless case was appealed by the government and appears as *United States* v. *Cless,* 254 F. 2d 590, where the circuit court affirmed the lower court and stated:

"We find nothing the the statute giving the United States rights in this matter superior to the rights enjoyed by private citizens. The statute accords to the government no such preference." (p. 593.)

In the same opinion it is further stated:

"In the absence of express Congressional action to the contrary, we think it is not asking too much from a federal agency, which has embarked upon the [fol. 63] business of lending money in competition with private firms and individuals, simply to be governed by the same local law which controls the rights of private citizens in a similar endeavor." (p. 594.)

In view of the language in the above federal court decisions to the effect that there is nothing in 28 U.S.C., § 2410 giving the government rights that are superior or preferential to the rights enjoyed by private citizens, we are unable to see that the government in this appeal has made it affirmatively appear that its substantial rights have been prejudiced. In its answer in the original foreclosure proceedings, the government, under 28 U.S.C., § 2410, could have asked for preferential or superior rights of redemption over those of the mortgagors, or at the time the trial court entered its judgment of foreclosures the government could have sought to have its redemption rights determined, and finally, had the trial court, in view of the decisions of the federal courts, refused to grant such preferential or superior rights, the government still had the authority and power to bid at the sheriff's sale, which would have fully protected it. The government admits that it had the authority and power to bid at the sheriff's sale the same as any private citizen in its position. The federal farm mortgage corporation was holder of a second mortgage under circumstances identicle with those in our present case in *Federal Land Bank* v. *Ludwig*, 157 Kan. 657, 143 P. 2d 784. The mortgage corporation appealed from an adverse decision of the court below. This court set out the pertinent statutes (pp. 659-660.) and in reversing the trial court, substantially stated what has just been said above in respect to the government's right to redeem. (pp. 660-661.)

In *United States* v. *Jungels*, 167 Kan. 482, 207 P. 2d 402, the government filed a claim on notes which had been barred by the five year statute of limitation for a long time—but less than twenty years. The evidence showed that during his lifetime the deceased maker had been sol-

vent so far as non-exempt personal, real, and mixed property was concerned. The trial court's instructions were that the jury could consider all this in determining "that it is more likely that these notes have been paid than that they have not," (p. 484) and in affirming the verdict and judgment against the government, this court set out the controlling rules of evidence and concluded:

> "While the statutes of limitation and nonclaim do not run against the United States when suing in its sovereign capacity it is well established that when the United States brings an action for money it is governed by the rules of evidence just as any litigant." (pp. 487-488.)

[fol. 64] Considering the terms of the government's mortgage which bound both it and the mortgagors, all the provisions of 28 U. S. C., § 2410, the appropriate Kansas statutes and the cases decided thereunder, and the points emphasized in the foregoing discussion, we are compelled to hold the trial court was correct in its final decree overruling the motion of the government for a certificate of redemption irrespective of the reasons given or those that may be inferred from the journal entry of judgment.

Affirmed.

Appendix

"28 U. S. C. 2410 provides as follows:

"(*a*) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

"(*b*) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court

with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

"(c) A judicial sa[illegible]in such action or suit shall have the same effect resp[illegible]g the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the [fol. 65] property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

"(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises,

to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien."

[fol. 66-67] [SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C.

October 2, 1959

Address Reply to the
Division Indicated

and Refer to Initials and Number
GCD:SDS:MRJ
101-29-107

AIR MAIL

Mr. Walt Neibarger
Clerk, Supreme Court of Kansas,
Topeka, Kansas

Re: John Hancock Mutual Life Insurance Co., Appellee v. George Hetzel, et al., Appellees, and United States of America, Appellant (No. 41429).

Dear Mr. Neibarger:

Enclosed herein for filing in your Court is a notice of appeal by the United States in the above-captioned case to the Supreme Court of the United States, in accordance with Rule 10 of the Rules of the Supreme Court of the United States. We enclose also a certificate of service.

As requested in the notice, your preparation and transmission of the record to the Supreme Court will be greatly appreciated.

Yours very truly,

GEORGE COCHRAN DOUB
Assistant Attorney General
Civil Division

By: /s/ Samuel D. Slade
Samuel D. Slade
Chief, Appellate Section

Enclosures

cc: Barton E. Griffith, Esquire
National Bank of Topeka Building
Topeka, Kansas

James E. Boyd, Esquire
Larned, Kansas

Rae E. Batt, Esquire
Kinsley, Kansas

H. F. Thompson, Esquire
Kinsley, Kansas

E. C. Minner, Esquire
Dodge City, Kansas

John Etling, Esquire
Kinsley, Kansas

[fol. 68]

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 41,429

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation, APPELLEE

vs.

GEORGE HETZEL; GRACE MARIE HETZEL; H. D. TAYLOR; AMY F. TAYLOR; BERT LEWIS; BUCK LEWIS; W. E. ROSTINE, WM. R. ROSTINE, BOYD L. ROSTINE; and all persons who are or were doing business under the name of THE HUTCHINSON CONCRETE COMPANY; THE HOME LUMBER AND SUPPLY COMPANY, INC., a Corporation; HIRAM T. BURR, INC., a Corporation; A. A. DOERR MERCANTILE COMPANY, a Corporation; SARAH J. STOUT; CATHERINE M. BOSTWICK; W. L. ROGERS; MARIAN KOCH; H. F. THOMPSON; GEORGE J. LANGFELD; MILTON M. MEYER; DONALD MEYER; VIRGIL ERNSTING; AUGUST KRUEGER; ROY W. REVELL; MARY CATHERINE BARROW; and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown officers, successors, trustees, creditors and assigns of such defendants as are existing, dissolved, or dormant corporations; the unknown executors, administrators, trustees, creditors, successors and assigns of such defendants as are or were partners or in partnership; and the unknown guardians and trustees of such of the defendants as are minors or are in any wise under legal disability; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EDWARDS, APPELLEES

and

THE UNITED STATES OF AMERICA, APPELLANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I

Notice is hereby given that the United States of America, the appellant above named, hereby appeals to the

Supreme Court of the United States from the final judgment entered on July 10, 1959, by the Supreme Court of the State of Kansas affirming the order overruling ap- [fol. 69] appellant's motion for an order directing the clerk to issue to it a certificate of redemption.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

II

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the complete record in the case.

III

The following question is presented by this appeal:

Whether the United States, as the second mortgagee of real estate judicially foreclosed and sold to satisfy the first mortgagee's lien in a proceeding to which the United States was made a party under the waiver of sovereign immunity contained in 28 U.S.C. 2410, can redeem within one year from the date of sale, as provided by 28 U.S.C. 2410(c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period.[1]

/s/ George Cochran Doub,
Assistant Attorney General.

/s/ Morton Hollander,

/s/ William A. Montgomery,
Attorneys,
Department of Justice,
Washington 25, D. C.

---

[1] The question in this case is closely related to *United States* v. *Illegible*, 264 F. 2d 767 (C.A. 3), in which the Government's petition for a writ of certiorari, filed June 23, 1959, is pending in the Supreme Court of the United States, No. 137, this Term.

[fol. 70] * * * *

[fol. 70-A]

No. 41429

IN THE

SUPREME COURT OF THE STATE OF KANSAS

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLEE

v.

GEORGE HETZEL, GRACE MARIE HETZEL, ET AL., APPELLEES

AND

THE UNITED STATES OF AMERICA, APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the accompanying Notice of Appeal by the United States to the Supreme Court of the United States on Barton E. Griffith, Esquire, National Bank of Topeka Building, Topeka, Kansas, James E. Boyd, Esquire, Larned, Kansas, Rae E. Batt, Esquire, Kinsley, Kansas, H. F. Thompson, Esquire, Kinsley, Kansas, E. C. Minner, Esquire, Dodge City, Kansas, and John A. Etling, Esquire, Kinsley, Kansas, by causing the same to be sent to them by air mail, postage prepaid, on October 2, 1959.

/s/ Morton Hollander
MORTON HOLLANDER
Attorney,
Department of Justice,
Washington 25, D. C.

[fol. 71] [SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C.

October 12, 1959

Address Reply to the
Division Indicated

and Refer to Initials and Number
GCD:SDS:WAM
101-29-107

AIR MAIL

Mr. Walt Neibarger
Clerk, Supreme Court of Kansas
Topeka, Kansas

Re: John Hancock Mutual Life Insurance Co., Appellee v. George Hetzel, et al., Appellees, and United States of America, Appellant (No. 41429)

Dear Mr. Neibarger:

This will acknowledge receipt of your letter of October 6, 1959, with respect to the above-captioned case. You inquired as to the meaning of the request in the notice of appeal that you prepare a transcript of the complete record in the case.

It is our impression that the record in your Court consists solely of (1) the printed abstract of record, (2) a copy of the mortgage instrument, which was not reproduced in the abstract but was filed pursuant to a stipulation between the parties, (3) the briefs filed by the parties, (4) the Court's opinion, and (5) the Government's notice of appeal. Our reference in the notice of appeal to "the complete record in the case" was intended to cover all these items except the briefs.

If there are other documents in the record, these too should be prepared in the manner required by Rule 10 of the United States Supreme Court for inclusion in the transcript of record. It is our understanding that the

original papers filed in the District Court of Edwards County were not transmitted to your Court. We wish to clarify that our request to have you transmit the complete record is based on the assumption that those papers are not part of the record insofar as your Court is concerned. [fol. 72] We trust that this explanation will make sufficiently clear the meaning of the request contained in the notice of appeal, and that it will not be necessary to file a praecipe.

Your letter does not specifically state the date on which the notice of appeal was received and filed. We assume that it was filed on October 6, the date of your letter, but if this assumption is incorrect, we would appreciate your informing us as to the exact date of filing.

Yours very truly,

GEORGE COCHRAN DOUB,
Assistant Attorney General
Civil Division

By: /s/ Samuel D. Slade
Samuel D. Slade
Chief, Appellate Section

cc: Barton E. Griffith, Esquire
National Bank of Topeka Building
Topeka, Kansas

James E. Boyd, Esquire
Larned, Kansas

Rae E. Batt, Esquire
Kinsley, Kansas

H. F. Thompson, Esquire
Kinsley, Kansas

E. C. Minner, Esquire
Dodge City, Kansas

John Etling, Esquire
Kinsley, Kansas

[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 74] SUPREME COURT OF THE UNITED STATES

No. 565, October Term, 1959

UNITED STATES, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., ET AL.

APPEAL from the Supreme Court of the State of Kansas.

ORDER NOTING PROBABLE JURISDICTION—February 23, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

February 23, 1960

☆ U. S. GOVERNMENT PRINTING OFFICE, 1960 347041 1361

In an order dated September 3, 1958 (Appendix B, *infra*, pp. 33–34), the district court overruled this motion on the ground that it was "without jurisdiction to grant the relief prayed for and [had] no jurisdiction of the subject matter of said motion."

From this order the United States perfected an appeal to the Supreme Court of Kansas.[3] In that court the Government pointed out that the redemption provisions of 28 U.S.C. 2410(c) and Kansas General Statutes, 1949, § 60–3440, are in direct conflict with each other. It contended that its redemption rights in this litigation must therefore be determined by the federal rather than the state statute, in accordance with the supremacy clause of Article VI of United States Constitution (Abs. 44, R. 9, Appendix A, *infra*, p. 27).

On July 10, 1959, the Supreme Court of Kansas affirmed the judgment of the district court (R. 12–24). The Supreme Court held, first, that the Government's motion had properly raised the question of its right to redeem under 28 U.S.C. 2410(c). In this connection, the Supreme Court determined that the district court, despite its statement that it was without "jurisdition" over the motion, had in fact assumed jurisdic-

[3] The United States filed its notice of appeal to that court on October 30, 1958. On January 14, 1959, just before the expiration of the one-year period within which, under Kansas General Statutes, 1949, § 60-3440, the mortgagors' right to redeem was exclusive, the mortgagors redeemed the property and the clerk of the district court issued a certificate of redemption to them (Appendix A, *infra*, p. 21).

tion and had overruled the Government's motion on its merits (Appendix A, *infra*, pp. 23–24).[3]

Second, the Supreme Court ruled that the Government's redemption rights in this litigation are governed by state law rather than the redemption provision in 28 U.S.C. 2410(c). This decision was based on two federal court decisions[4] which were read as authority for the proposition that "there is nothing in 28 U.S.C., § 2410 giving the government rights that are superior or preferential to the rights enjoyed by private citizens * * *" (Appendix A, *infra*, pp. 30–31). The court also quoted portions of the Government's mortgage which it thought relevant, and concluded (Appendix A, *infra*, p. 32):

> Considering the terms of the government's mortgage which bound both it and the mort-

[3] Appellees Hetzel argued in both the district court and the Supreme Court that the Government's motion sought a modification of the foreclosure decree and that, under the Kansas rule that a judgment may not be modified after the term in which it is entered, the motion was untimely. In rejecting this contention, the Supreme Court concluded that the district court had not purported to determine the relative redemption rights of the parties when it issued its original foreclosure decree. For this reason, the court held that the motion did not ask for a modification of the decree and that the rule concerning the alteration of judgments was inapplicable (Appendix A, *infra*, pp. 22–23).

This determination of Kansas law by the highest court of the state is final and there is, therefore, no issue before this Court as to the jurisdiction of the courts below to entertain the Government's motion on its merits. *Murdock* v. *City of Memphis*, 20 Wall. 590.

[4] *United States* v. *Cless*, 150 F. Supp. 687 (M.D. Pa.), affirmed, 254 F. 2d 590 (C.A. 3), and *United States* v. *Ryan*, 124 F. Supp. 1 (D. Minn.). See *infra*, pp. 11–13.

gagors, all the provisions of 28 U.S.C., § 2410, the appropriate Kansas statutes and the cases decided thereunder, * * * we are compelled to hold the trial court was correct in its final decree overruling the motion of the government for a certificate of redemption * * *.

THE QUESTION IS SUBSTANTIAL

This case is closely related to *United States* v. *Brosnan*, No. 137, and *United States* v. *Bank of America National Trust & Savings Assn.*, No. 183, both pending before this Court on writs of certiorari granted on October 12, 1959. In fact, the decision of the Supreme Court of Kansas in this case is in direct conflict with that of the Court of Appeals for the Ninth Circuit in *Bank of America*. See *infra*, p. 11.

The issue in each of these actions concerns the Government's rights as a junior lienholder where the senior lienor initiates proceedings to foreclose his lien. *Brosnan* and *Bank of America* present the question of whether a junior federal tax lien may be extinguished in a proceeding to which the United States is not joined as a party, under a state procedure which does not require the joinder of junior lienors in formal judicial proceedings. The present case raises an issue of comparable importance, *i.e.*, whether, in circumstances where the Government *is* joined in a judicial action under the waiver of sovereign immunity contained in 28 U.S.C. 2410, conflicting provisions of state law take precedence over rights given the United States by the federal statute.

FILE COPY

No. ~~565~~ 18

In the Supreme Court of the United States

OCTOBER TERM, 1959

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MORTON HOLLANDER,
WILLIAM A. MONTGOMERY,
Attorneys,
Department of Justice,
Washington 25, D.C.

I. In 28 U.S.C. 2410, Congress has given the consent of the United States to be "named a party in any civil action or suit * * * in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." This consent is expressly made subject to "the conditions prescribed in this section * * * for the protection of the United States * * *." One of these conditions is that (28 U.S.C. 2410(c)):

> Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem.

In this action, the United States was made a party defendant under the provisions of Section 2410 (Abs. 21), in its capacity as a second mortgagee of the subject real estate. A foreclosure sale was held to satisfy the first mortgagee's prior lien. The United States thereupon became vested, by the express terms of the federal statute, with a right to redeem the property during the prescribed one-year period.

In asserting this right to redeem in the courts below, the Government drew into question the validity of Kansas General Statutes, 1949, § 60-3440, on the ground of its being repugnant to the laws of the United States. That section provides that—

> For the first twelve months after [the sheriff's] sale, the right of the defendant owner to redeem is exclusive * * *.

It is apparent that this statute, insofar as it purports to give a mortgagor the *exclusive* right to redeem within the one-year period, is in square conflict with Section 2410(c). Under the supremacy clause of the Federal Constitution, Art. VI, cl. 2, such a conflict must be resolved in favor of the federal enactment. We accordingly argued below that the exclusivity provision of the state statute is unconstitutional as against the Federal Government, whose right of redemption must be considered "coexistent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949 * * *" (Abs. 34).

In the face of this contention, the Supreme Court of Kansas held Section 60-3440 to be fully applicable in this litigation. Its decision is, therefore, one "in favor of [the] validity" of a challenged state statute and falls directly within the appeal jurisdiction of this Court under 28 U.S.C. 1257(2). See cases cited, *supra*, p. 2.

2. This Court has long held that "[s]uits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro* v. *United States*, 303 U.S. 36, 41; *Nichols* v. *United States*, 7 Wall. 122, 126. Congress employed this principle when it enacted Section 2410, by qualifying its consent to suit with certain conditions "for the protection of the United States," including the requirement that the United States be given a redemption period of one year following the date of a foreclosure sale. As expressly indicated by the legislative history of this statute, Congress intended the

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CITATIONS

Government's right of redemption to be effective regardless of any contrary provisions of state law." H. Rept. No. 2722, 71st Cong., 3rd Sess., p. 4.

The Court of Appeals for the Ninth Circuit gave recognition to this legislative intention in *United States* v. *Bank of America National Trust & Savings Assn., supra.* It stated (265 F. 2d 862, 868):

> In our opinion a compliance with subsection "(c)" is a condition of the Government's consent to be sued under Section 2410. Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, *the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued.* [Emphasis added.]

To the same effect, see *First National Bank and Trust Co.* v. *Mac Garvie,* 22 N.J. 539.

In contrast to *Bank of America,* the decision of the Supreme Court of Kansas in the present case repudiates this clear statutory language and purpose. The court was wrong in concluding that "there is nothing in 28 U.S.C. § 2410 giving the government rights that are superior or preferential to the rights enjoyed by private citizens * * *." (Appendix A, *infra,* pp. 30–31.)

The two federal decisions cited by the court (Appendix A, *infra,* pp. 27–30) provide no support for this holding. Indeed, *United States* v. *Cless,* 254

Cases—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. —

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

No opinion was rendered by the District Court of Edwards County, Kansas. The opinion of the Supreme Court of Kansas (Appendix A, *infra,* pp. 18–32) is reported at 185 Kan. 274, 341 P. 2d 1002.

JURISDICTION

The judgment involved in this appeal was entered in a foreclosure suit in which the United States, as holder of a second mortgage, was named as a party defendant pursuant to 28 U.S.C. 2410. After a judgment of foreclosure and a sheriff's sale, the United States attempted to redeem the property pur-

suant to 28 U.S.C. 2410(c). The Supreme Court of Kansas upheld the exclusive right of the mortgagor to redeem for a period of a year following the sale under a provision of Kansas law (G.S. 1949, § 60-3440) which the United States claimed was repugnant to the federal statute. Thus, the case involved a judgment by the highest court of a state in a case where the validity of a state statute was drawn in question as being repugnant to a law of the United States and the decision was made in favor of its validity. This Court, therefore, has jurisdiction under 28 U.S.C. 1257(2). *International Union of United Automobile Workers* v. *O'Brien,* 339 U.S. 454; *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U.S. 18; *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767.

STATUTES INVOLVED

The pertinent statutes, 28 U.S.C. 2410 and Kansas General Statutes, 1949, § 60-3439, § 60-3440, are set forth in Appendix C, *infra,* pp. 35-37.

QUESTION PRESENTED

Whether the United States, as the second mortgagee of real estate judicially foreclosed and sold to satisfy the first mortgagee's lien in a proceeding to which the United States was made a party under 28 U.S.C. 2410, can redeem within one year from the date of sale, as provided by 28 U.S.C. 2410(c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period.

STATEMENT

The John Hancock Mutual Life Insurance Company originated this foreclosure action on September 3, 1957, by filing its petition against George and Grace Marie Hetzel, mortgagors, and numerous other potential claimants of interests in the property involved, including the United States (Abs. 2-12).[1] Process was duly served on the United States, in the manner prescribed by the waiver of sovereign immunity contained in 28 U.S.C. 2410 (Abs. 21).

The Insurance Company alleged that it held the Hetzels' note for $25,000, secured by a mortgage constituting a first lien on certain Kansas real estate, on which the mortgagors were in default. It sought a money judgment and asked that its mortgage be adjudged a first lien superior to any interests claimed by any of the defendants, that the mortgage be foreclosed, and that the property be sold to satisfy plaintiff's claim (Abs. 10-12).

In its answer and cross-petition, the United States asserted that the Farmers' Home Administration held four separate promissory notes, three having been executed by both mortgagors and one by George Hetzel alone, on which a total of $12,944.83, with interest, was due. One of these notes, in the face amount of $10,565, was alleged to be secured by a second mortgage on the same property (Abs. 13-14). The Government acknowledged the priority of the

[1] "Abs." refers to the printed Abstract of Appellant, in the Supreme Court of Kansas, which appears at page 1 of the transcript of record in this Court; "R." refers to the transcript of record in this Court.

Insurance Company's mortgage but prayed that the total amount of its claims be adjudged a second lien, inferior only to the Insurance Company's.

On December 4, 1957, the state district court granted judgment to the Insurance Company for $26,944.78, with interest and costs, and to the United States for (1) $10,402.61, with interest and costs, on the note secured by the mortgage, and (2) a total of $2,642.39, with interest, on the other notes. Holding that the Insurance Company's and the Government's mortgages constituted first and second liens, respectively, the court ordered both to be foreclosed (Abs. 29–30).

A sheriff's sale was held on January 22, 1958, at which the Insurance Company bought in the property for the amount of its own judgment (Appendix A, *infra*, p. 19). The United States did not bid at the sale. By order of the district court the sale was confirmed on February 5, 1958, and the sheriff was directed to issue a certificate of sale to the purchaser, "fixing the period of redemption at eighteen months from the date of sale" (Abs. 33). The court further ordered that, if redemption was not made within that time, the sheriff should execute and deliver a deed conveying title to the property, free and clear of all claims of the defendants, to the holder of the certificate of sale (Abs. 33–34).

On June 5, 1958—approximately four and one-half months after the date of the sheriff's sale—the United States attempted to redeem the property, pursuant to the authority of 28 U.S.C. 2410(c), by submitting an affidavit and tendering the appropriate sum of re-

demption money to the clerk of the district court, in accordance with the procedure prescribed by Kansas General Statutes, 1949, § 60–3451 (Abs. 34–36). This tender was not accepted and the clerk declined to issue a certificate of redemption in return therefor (Appendix A, *infra*, pp. 19–20).

The United States thereupon filed a motion for an order directing the clerk to issue to it a certificate of redemption, alleging that it had made a proper tender of redemption money to the clerk. The Government based its entitlement to redeem on 28 U.S.C. 2410(c), which provides in relevant part that

> * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. * * *

It was asserted that this provision takes precedence over § 60–3440 of the Kansas General Statutes, 1949, which stipulates that "[f]or the first twelve months after such sale, the right of the defendant owner to redeem is *exclusive* * * *" (emphasis added). Specifically, the Government's motion stated that (Abs. 34):

> * * * The provisions of Title 28, United States Code, Section 2410(c), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60–3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein.

which section is appended hereto. This request was declined by the clerk and in a letter dated July 8, 1958, the district court, in brief, informed the government that the holder of the certificate of purchase and the mortgagors questioned the government's right to redeem the real property at that time and consequently the clerk would not issue the redemption certificate until the court so ordered. The letter further stated that the court would be on vacation until September but it presumed the government would want to file a motion raising the question and would serve opposing counsel and have the motion set for hearing.

On July 23, 1958, the government filed its motion seeking an order of the district court directing the clerk to issue a certificate of redemption to it, alleging that:

> "(a) The defendant has made a proper tender to the Clerk in keeping with the provisions of Section 60-3451, General Statutes of Kansas, 1949, and has filed with said tender its affidavit stating the amounts still due on its claim.
>
> "(b) The provisions of Title 28, United States Code, Section 2410(c), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein."

Another portion of the motion contained the affidavit referred to in (a) above.

On September 3, 1958, during a hearing on the government's motion, the mortgagors contended the trial court was without jurisdiction to grant the relief sought in the government's motion. The trial court

so found and in its order overruling the motion on the same day stated:

> "* * * this court is without jurisdiction to grant the relief prayed for and has no jurisdiction of the subject matter of said motion."

The government timely perfected the instant appeal from the above order and raises two questions.

1. Did the trial court err in denying the government's motion made on the ground that 28 U.S.C. 2410(c) accords the government a coexistent redemption right with that of the mortgagors under G.S. 1949, 60-3440?
2. Did the trial court have jurisdiction over the subject matter of the motion and to grant the relief prayed for?

On January 14, 1959, the mortgagors redeemed the property and were issued a certificate of redemption by the clerk of the court.

As is customary, we will proceed to the determination of the jurisdictional question, if one there be, before reaching the first question raised by the government.

The foreclosure decree entered on Decembr 4, 1957, and the order of confirmation of sheriff's sale on February 5, 1958, occurred during the term of court beginning on the fourth Monday of October, 1957, the next term began on the second Monday of February, 1958, and the government's request of the court clerk for a redemption certificate made on June 5, 1958, was in the term of that court which began on the first Monday of May, 1958. The motion, as above stated, was filed on July 23, 1958, which means that two terms of court in the thirty-third judicial district including Edwards county (G.S. 1949, 20-1029a) had expired from the time of the trial court's decree and

order on December 4, 1947, and the government's demand on the court clerk and motion addressed to the trial court on July 23, 1958.

The mortgagors contend that a trial court loses jurisdiction over its judgment after the expiration of the term in which a judgment is rendered absent the exceptions provided for in G.S. 1949, 60–3007, which are not present here. The contention is too far-reaching. The controlling rule of law as to jurisdiction after term was stated in *Keys* v. *Smallwood*, 152 Kan. 115, 102 P. 2d 1001.

> "Rule followed that a judgment cannot be set aside, modified or in anywise affected after the term at which it is rendered except as provided by the civil code." (Syl. ¶ 1.)

However, the Keys case was a garnishment proceeding and is not applicable in our present case.

Other authorities cited by the mortgagors are somewhat similar to the overall picture presented by our present case but they are distinguishable as to the question under consideration and, therefore, are not determinative thereof.

The government calls our attention to *Johnson* v. *Wear*, 110 Kan. 237 Pac. 141, wherein (p. 243) *Mitchell* v. *Insley*, 33 Kan. 654, 657, 7 Pac. 201, was cited. The Mitchell case involved an original ejectment action where a deed was determined to constitute a mortgage to secure a payment of $2,000 and the mortgagee had a lien upon the land but it was further determined his remedy was not by ejectment. Subsequently the mortgagee filed a mortgage foreclosure suit wherein the amount due under the mortgage was in issue. (p. 658.) The court stated that the amount due on the mortgage in the ejectment action was wholly immaterial, that the adjudication the deed was a mortgage was conclusive, and perhaps that *some-*

thing was due, but not the amount. The question of the amount due, therefore, remained undetermined. Justice Marshall in the Johnson case (p. 243) quoted the following language from page 657 of the Mitchell case:

> " 'It is the general duty of the court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment.' "

The Mitchell case was also cited in *Landon* v. *Clark*, 221 Fed. 841, 845.

The only provision of the decree of foreclosure pertaining to redemption reads:

> "* * * and in case said real estate is not redeemed from said sale for a period of eighteen months from the date of sale, as is by law in such cases made and provided * * *."

By reason of the foregoing, the trial court obviously did not fully determine the redemption rights of the mortgagors as against the government, or *vice versa*, except by the general language of the phrase, "* * * as is by law in such cases made and provided." The redemption rights of the mortgagors under our state statutes (G.S. 1949, 60-3440, *et seq.*) were therefore covered as were also the government's redemption rights under 28 U.S.C. § 2410. Expressed in another way, the trial court, by using the language quoted above, of necessity ruled that all questions regarding the redemption of the real property here involved would be governed by both state and federal law.

We believe the trial court intended to subject the redemption questions to both state and federal law

and that it made clear such intention when ruling on the government's motion by use of the following language:

> "Now therefore, it is by the court considered, ordered adjudged and decreed that said motion be and hereby is overruled."

What other possible construction can be given this order? The motion was neither dismissed nor stricken, but was ruled upon, and in view of what has herein been said and the authorities relied on by the government in support of its contention that the trial court did have jurisdiction of the subject matter, we can only conclude the trial court had, and exercised, authority to determine the rights of redemption "as is by law in such cases made and provided," as well as the power to grant or deny the relief prayed for in the motion by the government.

Determination of the second question requires that we set out a part of the mortgage executed by the mortgagors to the government. The form contained the following heading:

> "United States Department of Agriculture
> "Farmers Home Administration
> "REAL ESTATE MORTGAGE FOR KANSAS
> "Special Livestock Loan"

Section 21 of the mortgage contained these provisions:

> "THAT TIME IS OF THE ESSENCE of this mortgage and of the note * * * AND SHOULD DEFAULT be made in the payment of the note secured hereby, or any installment due under said note * * * or if for any reason the Mortgagee should deem itself insecure, then in any of said events Mortgagee is hereby irrevocably authorized and empowered * * * (1) to inspect and repair said property * * *

(2) to declare the entire indebtedness herein secured immediately due and payable and to foreclose this mortgage in the manner hereinafter set out, and (3) to pursue any remedy for it by law provided; PROVIDED, HOWEVER, that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power, or remedy of Mortgagee, whether herein set out or conferred by law. * * *".

Section 22 in part provided:

"That Mortgagee may foreclose this mortgage by action in a court of competent jurisdiction in accordance with the laws existing at the time of the commencement thereof. * * *"

Section 23 in pertinent part reads:

"That; should this said property be sold under foreclosure (1) Mortgagee or its agent may bid at such sale and purchase said property as a stranger: (2) Mortgagor will pay all costs * * * (3) Mortgagor does hereby expressly waive, *to the extent permitted by law* the benefits of all homestead, dower, exemption valuation, appraisement, stay and moratorium *laws of the State of Kansas* now in force or which may hereafter become laws, and the rights of possession of the mortgaged property during the period of redemption." (Our emphasis.)

The mortgagors base their contentions primarily on G.S. 1949, 60-3440 as follows:

"For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendant and owner whose demand is a lien upon such real estate may redeem the same at any time within fifteen months from the date of sale. A mechanic's lien, before decree enforcing the same, shall

F. 2d 590 (C.A. 3), may even be read as looking in the opposite direction. There, the United States had not in fact been joined in the first mortgagee's previous foreclosure action and the question was whether the Government's junior mortgage lien could have been extinguished by the sale in that action. The Court of Appeals for the Third Circuit held that it was so extinguished, since joinder was unnecessary under the relevant state law. The Third Circuit viewed the standing of inferior federal liens as being controlled exclusively by state law, and concluded that joinder of the United States under 28 U.S.C. 2410 is required only "[i]n states where it is necessary to join junior lienors * * *." 254 F. 2d at 593.

In the present foreclosure action, however, the United States was in fact joined under Section 2410. Moreover, unlike the state law determined to be applicable in *Cless*, under Kansas law a junior lien holder is a necessary party to a first mortgagee's foreclosure action. *Stacey* v. *Tucker*, 123 Kan. 137; *Motor Equipment Co.* v. *Winters*, 146 Kan. 127; and see *Garber* v. *Bankers' Mortgage Co.*, 27 F. 2d 609, 610 (D. Kan.). Thus, application of the interpretation given to 28 U.S.C. 2410 by the Third Court in *Cless* could be said to require that the provisions of that statute be given full effect in this litigation.[5]

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[5] The Government does not concur in the Third Circuit's reasoning in *Cless*, which that court again followed in *United States* v. *Brosnan*, *supra*. It is our position, which we are advancing before this Court in *Brosnan* and *Bank of America*, that no federal lien may be extinguished without a judicial proceeding to which the United States is made a party in the manner prescribed by federal law.

United States v. *Ryan,* 124 F. Supp. 1 (D. Minn.), the other federal decision cited below, is likewise not helpful in the present context. That case concerned the issue of whether the United States had recorded a tax lien in accordance with state recording statutes. Further, that case has been overruled by the Eighth Circuit in *United States* v. *Rasmuson,* 253 F. 2d 944, 946.

Nor is there merit to the implication in the opinion of the Supreme Court of Kansas that the Government in its mortgage contract agreed to be bound by state law despite the redemption provision of Section 2410 (c). See Appendix A, *infra,* pp. 24–25, 32. While it is true that the mortgage is entitled "Real Estate Mortgage for Kansas," and that the "laws of the State of Kansas" are referred to in paragraph 23 thereof, the instrument also stipulates "that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power or remedy of Mortgagee, *whether herein set out or conferred by law* * * *" (R. 4, 6, 7; emphasis added). The designation of the contract as a "Kansas" mortgage and the reference to state law in paragraph 23 are, therefore, not to be construed as an adoption of any provision of state law in conflict with "the federal policy to protect the treasury and to promote the security of federal investment * * *" which is expressed in Section 2410(c). *United States* v. *View Crest Garden Apts.,* 268 F. 2d 380, 383 (C.A. 9), certiorari denied, November 9, 1959, U.S. Sup. Ct. No. 372, this Term.

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3. As previously noted, this Court has granted both the Government's petition for a writ of certiorari in *United States* v. *Brosnan*, No. 137, this Term, and the bank's petition, in which the Government acquiesced, in *United States* v. *Bank of America National Trust & Savings Assn.*, No. 183, this Term. These cases involve the question of whether a junior federal tax lien may be extinguished in a proceeding to which the United States is not made a party in the manner prescribed by federal law. We are there contending that any proceeding purporting to affect an inferior federal lien is a "suit against the United States," which may only be maintained in accordance with the conditions prescribed by Congress. *Minnesota* v. *United States*, 305 U.S. 382, 386; *United States* v. *Alabama*, 313 U.S. 274, 282.

If the decision in this case is allowed to stand, however, the necessity of joining the United States as a party—the issue in *Brosnan* and *Bank of America*—will become of less importance to the Government. For the Supreme Court of Kansas has held that, even where the United States as a junior lienor *is* a necessary party under state law and *is* joined pursuant to a congressional waiver of immunity, the conditions imposed upon that waiver may be ignored if they conflict with state law. Under this decision, the importance of joinder is reduced since in any event the federal security may be divested without reference to the restrictions enacted by Congress "for the protection of the United States."

The enforceability of inferior federal liens, in accordance with the terms specified by Congress, is of

real concern to the Federal Government. The Court has recognized the importance of the problem with respect to the administration of the tax laws by granting certiorari in *Brosnan* and *Bank of America*. The standing of such liens is of equally vital significance in the administration of the Government's vast lending and financial assistance programs.[6]

The effect of the decision below is to require the United States, "[w]here a sale of real estate is made to satisfy a lien prior to that of the United States,"[7] to bid at the foreclosure sale or risk losing its security altogether. In Kansas, for example, redemption by the mortgagor[8] within the one-year period in which his right to redeem is supposedly exclusive cuts off the redemption right of junior creditors and completely extinguishes the interest of these creditors in the property. *Frazier* v. *Ford*, 138 Kan. 661; *McFall* v. *Ford*, 133 Kan. 593, rehearing denied, 133 Kan. 678, certiorari denied, 285 U.S. 537; *Sigler* v. *Phares*, 105 Kan. 116. The Kansas court's decision in this case would, if followed elsewhere, work a similarly drastic result in jurisdictions with comparable

[6] We are advised by the Department of Agriculture that the Farmers' Home Administration alone has made or insured presently outstanding loans of more than $120,000,000 which are secured by second mortgages or junior liens on real estate. This security was all taken pursuant to specific statutory authorization, *e.g.*, the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1003 (farm ownership loan program), 1007 (operating loan program); 42 U.S.C. 1472(b)(1) (farm housing loan program); 16 U.S.C. 590r, *et seq.* (water conservation loan program); 12 U.S.C. 1148a-1, 2, 4 (other emergency loans).

[7] 28 U.S.C. 2410(c).

[8] See *supra*, p. 6, n. 2.

redemption statutes [9] or in the numerous states where there is no provision in force permitting redemption after sale. See Tiffany, *Real Property* (3d Ed., 1939), § 1530.

The legislative history of Section 2410 [10] indicates that Congress initially considered the alternatives of permitting the Government to bid at a foreclosure sale and to redeem. As passed by the Senate, the original bill contained a provision designed to permit delay of a judicial sale so that the Government might obtain a congressional appropriation to enable it to bid at the sale. See S. Rept. No. 351, 71st Cong., 2d Sess., pp. 1–2. This provision was stricken by the Conference Committee, and the redemption provision which is now contained in Section 2410(c) was substituted.

In rejecting the Senate-proposed method of protecting the rights of the United States as a junior lien holder, the Conference Committee concluded that a federal redemption provision—even if it conflicted with and thus frustrated state redemption limitations—was a more adequate method for protecting those rights. H. Rept. No. 2722, 71st Cong., 3d Sess., p. 4. It thus recognized the necessity for the Government to have a reasonable time after the sale, *i.e.*, one year, in which to take steps for the preservation of its interest.

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[9] *E.g.*, Iowa Code Ann., § 628.3; Wyoming Stat. 1957, § 1–480.

[10] 28 U.S.C. 2410 was first enacted by the Act of March 4, 1931, 46 Stat. 1528. It has since been reenacted with slight changes not relevant here.

CONCLUSION

The question presented is of substantial importance, and this Court should note probable jurisdiction of the appeal.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MORTON HOLLANDER,
WILLIAM A. MONTGOMERY,
Attorneys.

DECEMBER 1959.

APPENDIX A

[In the Supreme Court of the State of Kansas]

No. 41,429

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY APPELLEE

v.

GEORGE HETZEL, GRACE MARIE HETZEL, ET. AL., APPELLEES, AND THE UNITED STATES OF AMERICA, APPELLANT

* * * * *

Appeal from Edwards district court; LORIN T. PETERS, judge. Opinion filed July 10, 1959. Affirmed.

The opinion of the court was delivered by—

ROBB, J.: The John Hancock Mutual Life Insurance Company, hereafter referred to as the insurance company, on September 3, 1957, filed the original suit herein to recover judgment on its note and foreclose its first mortgage lien on real property in Edwards county belonging to George Hetzel and Grace Marie Hetzel, hereafter referred to as mortgagors, who had executed a note and mortgage as security therefor. Another defendant and the appellant here, the United States of America, hereafter referred to as the government, is also holder of notes and a second mortgage, as security for one of the notes, executed by the same mortgagors on the same real property. In this appeal we are not concerned with other defendants of record or their claims. No dispute exists as to the priority of the mortgages nor as to the pleadings and we shall therefore refer only to the pertinent parts thereof

as we proceed with our discussion of the points at issue.

On December 4, 1957, the trial court entered judgment on the respective notes and foreclosed the first mortgage in favor of the insurance company and the second mortgage in favor of the government. The decree further provided that if the mortgagors failed to pay the judgments within ten days, the sheriff of Edwards county was directed to advertise and sell the real property according to law subject to redemption for a period of eighteen months after the date of sale. The proceeds were to be applied on costs, taxes, on the first lien of the insurance company and then on the government's second lien.

The mortgagors failed to pay within ten days and on January 22, 1958, the sheriff's sale was held. The only bidder was the insurance company which bid the property in for the full amount of its judgment, interest, taxes and costs. The government did not bid at the sheriff's sale. The insurance company was the only party who appeared to move for the court's confirmation order of the sheriff's sale. On February 7, 1958, the trial court confirmed the sale and directed the sheriff to issue to the purchaser a certificate of sale for the real property, fixing the period of redemption at eighteen months from the date of sale. If redemption were not made within time, the sheriff was directed to make, execute and deliver to the holder of said certificate his sheriff's deed to the real property and put the holder thereof in possession.

On June 5, 1958, the government requested the district court clerk to issue a certificate of redemption to it pursuant to its tender under G.S. 1949, 60–3451. The amount thereof was to be measured by the *lex rei sitae* (normal state-law rule) to effectuate its right to redeem the property under 28 U.S.C. 2410(c),

George Hetzel, finds that this court is without jurisdiction to grant the relief prayed for and has no jurisdiction of the subject matter of said motion.

Now therefore, it is by the court considered, ordered, adjudged and decreed that said motion be and hereby is overruled.

/s/ LORIN T. PETERS,
Judge.

APPENDIX C

1. 28 U.S.C. 2410 provides as follows:

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale

to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

2. The pertinent provisions of the Kansas General Statutes, 1949, are as follows:

> § 60–3439. * * * The defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs and taxes, as provided for in this act, at any time within eighteen months from the day of sale * * *.
>
> § 60–3440. * * * For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendant and owner whose demand is a lien upon such real estate may redeem the same at any time within fifteen months from the date of sale. * * *

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not be deemed such a lien as to entitle the holder to redeem."

The government places its reliance on 28 U.S.C. § 2410, which is hereto appended in full, but more particularly it relies on subsection (c) thereof, as follows:

> "Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem."

Mortgagors referred to other statutes involving redemption. Some of them are of little, if any, help in the determination of this appeal. Briefly stated, those that are pertinent here provide that after the issuance of the certificate to the purchaser at the sheriff's sale (G.S. 1949, 60–3438), the mortgagors could redeem the real property at any time within eighteen months from the day of sale (60–3439); for the first twelve months after the day of sale the mortgagors had the exclusive right to redeem but if at the end of that time they had not done so, any lien creditor could redeem within fifteen months from the date of sale (60–3440); after the expiration of the fifteen months, the mortgagors could still redeem at any time before the end of the eighteen months, but the creditors could not. (60–3447.) The mortgagors could assign or transfer their rights of redemption whereby those same rights would pass to an assignee or transferee. (60–3455.) See *Union Central Life Ins. Co. v. Reser*, 134 Kan. 876, 8 P. 2d 366, for further discussion of some of our redemption statutes.

The sovereign immunity of the government from suit without the express mandate of the Congress to the contrary, by waiver or granting permission for such suit or suits, is of sufficient general knowledge

that a full legal discussion thereof would be surplusage.

Neither can there be any argument with the government's contention that federal laws are supreme over state laws where a conflict exists between them such as occurred in an action in a state court to recover statutory penalties for violation of the emergency price control act. (*Testa* v. *Katt,* 330 U.S. 386, 67 S. Ct. 810, 91 L. ed. 967.) The same is true where there were labor disputes involving interstate or foreign commerce. (*Myers* v. *Bethlehem Corp.,* 303 U.S. 41, 58 S. Ct. 459, 82 L. ed. 638.)

The Supreme Court of the United States has not been hesitant in cases involving diversity of citizenship to remand them for determination by the federal circuit court under state laws. For example, *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1189, was an action concerning tort liability and involved application of state laws by the federal circuit court.

In *United States* v. *Ryan,* 124 F. Supp. 1, the Minnesota Torrens system as it related to the filing of federal tax liens was comprehensibly explained and it was held that the government failed to comply with the procedural requirements of the state law whereby its lien for taxes was lost. We cannot repeat all that was said in the Ryan case, as to do so would unduly extend this opinion, but the following statements therefrom are of significant consequence herein:

> "The United States is not exempt from the provisions of the state statutes. The laws of the United States definitely provide that the tax lien here asserted will not become a valid lien unless notice thereof is filed as by state law prescribed. A state law affecting the title to property must be followed, and is binding upon the United States." (p. 10.)

"At any time, however, up to the time of the foreclosure of the prior mortgage held by Minnesota Federal Savings and Loan Association, the plaintiff could have perfected its lien by filing the notice as by statute required. The foreclosure of the mortgage and the expiration of the period of redemption has now precluded plaintiff from so doing. The mortgage contained a power of sale. Under the laws of the State of Minnesota, a mortgage containing a power of sale may be foreclosed by advertisement. There is nothing in the United States Code which precludes a foreclosure by advertisement. 28 U.S.C.A. § 2410 provides that in any action to foreclose a mortgage the United States *may* be joined as a party defendant. But there is nothing in this section, or in any section of the United States Code, which prohibits a foreclosure under a power of sale or which provides that the United States will not be bound thereby. The Minnesota Federal Savings and Loan Association was entitled to foreclosure by advertisement, and the plaintiff, and all other parties interested in the property, is bound by the foreclosure. This exact question was before the Court in the case of Trust Co. of Texas v. United States, D.C., 3 F. Supp. 683, and the Court held that a mortgage foreclosure under power of sale extinguishes not only the rights of the owner in the property sold, but all subsequent and inferior liens thereon, *including the lien of the United States.* Therefore, in the instant case, the foreclosure divested the interest of the registered owner, Kenneth Ryan, and the rights of all parties claiming under or through him, including the plaintiff here." (pp. 10–11.)

A case more analogous to our present one is *United States v. Cless*, 150 F. Supp. 687, where a first mortgagee had obtained a writ of *fieri facias* and later bid in and purchased the mortgaged property at the

sheriff's sale. He then sold the property to another but title had not yet passed. The government was seeking foreclosure of its second mortgage and the question was whether the second mortgage lien was divested by the sheriff's sale in the light of 28 U.S.C. § 2410. In rendering summary judgment against the government, the district court there said:

> "At the time the agency [the government] made this loan and entered its mortgage it had notice that its mortgage was second in lien to a first mortgage held by an individual entered over a year prior thereto.
>
> "The mortgagors defaulted on their first mortgage. The mortgagee foreclosed and bought in the property at the Sheriff's sale on his bid of the costs of the sale. Had the second mortgagee been an individual there is no question but that the lien of the second mortgagee would have been extinguished by the foreclosure on the first mortgage. Is the situation changed because the United States happens to be the second mortgage holder?
>
> "The Government leans heavily on 28 U.S.C. § 2410(a), above cited. This statute is not mandatory—merely waives sovereign immunity in suits to foreclose mortgages or quiet titles. *Haldeman v. United States*, D.C.E.D. Mich., 93 F. Supp. 889. In other words, the purpose of this statute in which the United States consents to be named a party in an action which seeks an adjudication touching any mortgage or other lien of the United States is merely to waive sovereign immunity from suit in certain types of cases. *Wells v. Long*, 9 Cir., 162 F. 2d 842.
>
> "If the United States is entitled to a priority in this case it must be based on some statutory enactment. * * * the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States." (pp. 689-690.)

The court therein further stated:

> "I find no evidence of a Congressional sensitivity in relation to claims of the Government predicated on loans made to individuals by various governmental agencies comparable to that evidenced in relation to tax claims, and for the very obvious reason that the latter deals, as above indicated, with a matter of public policy—the collection of taxes to enable the Government to function. Certainly what was said in the Ryan case, *supra,* is pertinent in connection with the problem presented in this case concerning the lien of the United States under a second mortgage created in the course of an ordinary business transaction of an agency of the United States, as to which there is no federal statutory provision conferring any particular sanctity, and which, therefore, is dependent entirely both as to its position and enforcement upon State laws." (p. 692.)

The Cless case was appealed by the government and appears as *United States v. Cless,* 254 F. 2d 590, where the circuit court affirmed the lower court and stated:

> "We find nothing in the statute giving the United States rights in this matter superior to the rights enjoyed by private citizens. The statute accords to the government no such preference." (p. 593.)

In the same opinion it is further stated:

> "In the absence of express Congressional action to the contrary, we think it is not asking too much from a federal agency, which has embarked upon the business of lending money in competition with private firms and individuals, simply to be governed by the same local law which controls the rights of private citizens in a similar endeavor." (p. 594.)

In view of the language in the above federal court decisions to the effect that there is nothing in 28

U.S.C., § 2410, giving the government rights that are superior or preferential to the rights enjoyed by private citizens, we are unable to see that the government in this appeal has made it affirmatively appear that its substantial rights have been prejudiced. In its answer in the original foreclosure proceedings, the government, under 28 U.S.C., § 2410, could have asked for preferential or superior rights of redemption over those of the mortgagors, or at the time the trial court entered its judgment of foreclosures the government could have sought to have its redemption rights determined, and finally, had the trial court, in view of the decisions of the federal courts, refused to grant such preferential or superior rights, the government still had the authority and power to bid at the sheriff's sale, which would have fully protected it. The government admits that it had the authority and power to bid at the sheriff's sale the same as any private citizen in its position. The federal farm mortgage corporation was holder of a second mortgage under circumstances identical with those in our present case in *Federal Land Bank* v. *Ludwig,* 157 Kan. 657, 143 P. 2d 784. The mortgage corporation appealed from an adverse decision of the court below. This court set out the pertinent statutes (pp. 659–660) and in reversing the trial court, substantially stated what has just been said above in respect to the government's right to redeem. (pp. 660–661.)

In *United States* v. *Jungels,* 167 Kan. 482, 207 P. 2d 402, the government filed a claim on notes which had been barred by the five year statute of limitation for a long time—but less than twenty years. The evidence showed that during his lifetime the deceased maker had been solvent so far as non-exempt personal, real, and mixed property was concerned. The trial court's instructions were that the jury could consider all this

in determining "that it is more likely that these notes have been paid than that they have not," (p. 484) and in affirming the verdict and judgment against the government, this court set out the controlling rules of evidence and concluded:

> "While the statutes of limitation and nonclaim do not run against the United States when suing in its sovereign capacity it is well established that when the United States brings an action for money it is governed by the rules of evidence just as any litigant." (pp. 487–488.)

Considering the terms of the government's mortgage which bound both it and the mortgagors, all the provisions of 28 U.S.C., § 2410, the appropriate Kansas statutes and the cases decided thereunder, and the points emphasized in the foregoing discussion, we are compelled to hold the trial court was correct in its final decree overruling the motion of the government for a certificate of redemption irrespective of the reasons given or those that may be inferred from the journal entry of judgment.

Affirmed.

APPENDIX B

In the District Court of Edwards County, Kansas

No. 6758

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION, PLAINTIFF

vs.

GEORGE HETZEL, ET AL., DEFENDANTS

JOURNAL ENTRY

Now on this 3rd day of September, 1958, the same being an adjourned day of the regular May, 1958, term of said Court, the above entitled cause comes on to the court for hearing on the motion of the United States of America for an order directing the clerk of said court to issue to it a certificate of redemption for the real estate heretofore sold in the above entitled action on mortgage foreclosure sale. The United States of America is present by E. Edward Johnson, Assistant United States Attorney for the District of Kansas; the defendant, George Hetzel, is present by his attorneys, John A. Etling and W. N. Beezley, of Kinsley, Kansas.

And now the United States of America, by and through its said Attorney waives oral argument on its part and submits said motion on its written brief filed herein. And now counsel for the defendant, George Hetzel, are heard orally on said motion, and the court having considered the written brief filed herein on behalf of the United States of America, and having heard the argument of said counsel for the defendant,

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JAMES R. BROWNING

No. ~~365~~. 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

MOTION TO DISMISS OR AFFIRM.

W. D. JOCHEMS,
HARRY L. HOBSON,
500 Farmers & Bankers Life Bldg.,
Wichita, Kansas,
Attorneys for Appellees.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3730

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 565.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL.

MOTION TO DISMISS OR AFFIRM.

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the question presented is not of substantial importance, does not merit argument before this Court, and was properly decided by the Supreme Court of the State of Kansas.

OPINIONS BELOW.

No opinion was rendered by the District Court of Edwards County, Kansas. The opinion of the Supreme

Court of the State of Kansas is reported at 185 Kan. 274, 341 P.2d 1002, and is set forth in Appendix A to Appellant's Jurisdictional Statement at pp. 18-32.

STATUTES INVOLVED.

The pertinent statutes are set forth in the appendix to Appellant's Jurisdictional Statement at pp. 35-37.

JURISDICTION.

Appellant asserts that the jurisdiction of this Court is founded on 28 U.S.C. 1257 (2) in that the case involves the judgment of the highest court of a state in a case where the validity of a state statute was drawn in question as being repugnant to a law of the United States and the decision was in favor of its validity. Appellees concede that the United States argued before the Supreme Court of the State of Kansas that there existed a conflict between a federal and a state statute and appellees further concede that the Supreme Court of Kansas decided in favor of the validity of the state statute.

QUESTION PRESENTED.

Whether 28 U.S.C. 2410 (c) grants the United States, as the second mortgagee of real estate judicially foreclosed and sold in a suit in which the United States was afforded all the relief it sought but failed to protect its interest by bidding at the foreclosure sale, the right to redeem within one year from the date of sale when by state statute the mortgagor has the exclusive right to redeem during that period.

STATEMENT OF THE CASE.

The statement set forth in Appellant's Jurisdictional Statement adequately states the factual background to this controversy though appellees object to the assumption from time to time by appellant that 28 U.S.C. 2410 (c), under the circumstances of this case, is "authority" for redemption within the twelve month period by the Government. From appellees' viewpoint, the facts that the United States sought affirmative relief in the proceeding (Abs. 16), was granted such relief (Abs. 29-30), and failed to bid at the sale following foreclosure (Appellant's Statement, p. 4) are of prime importance in the determination of the question here presented.

THE QUESTION IS NOT SUBSTANTIAL.

The United States asserts that the question here presented is of substantial importance and consequently this Court should note jurisdiction of still another case on an already over-crowded docket. How the question can be substantial and important when this attempt by the appellant appears to be the first time the position taken by the United States has ever been argued before this Court is difficult to comprehend. The statute, now 28 U.S.C. 2410 (c), with minor changes unimportant here, was enacted on March 4, 1931. 46 Stat. 1528. It would seem that if the question were of critical importance it should have come to light long before this time.

To suggest, as appellant does, that because certiorari has been granted this Term in cases claimed to be "related", *United States* v. *Brosnan*, No. 137, and *United States* v. *Bank of America National Trust and Savings Ass'n*.

No. 183, jurisdiction should be noted here, is to overlook the conflict that existed among the Circuits on the questions presented in those cases. For example, the Government urged in its petition for a writ of certiorari in *United States* v. *Brosnan*, that four Courts of Appeals had considered the question there presented and that those four courts were evenly divided on the question. (See the petition of the United States in No. 137, O.T. 1959, at p. 5). Obviously the question there had reached the point where it was of substantial importance. It should be noted that the first time the question there was presented, *Metropolitan Life Ins. Co.* v. *United States*, 107 F.2d 311, certiorari was denied, 310 U.S. 630. Likewise, the second time the same question was presented, *United States* v. *Boyd*, 246 F.2d 477, certiorari was denied, 355 U.S. 889. Attention is also called to the government's memorandum brief in *Bank of America Nat'l Trust and Savings Ass'n* v. *United States*, No. 183, O.T. 1959, at pages 1-2, where the Government did not oppose certiorari for the reason that the clear conflict set forth in the petition in *United States* v. *Brosnan* existed. In the case at bar the United States is unable to demonstrate the same importance and substance as in the cases in which certiorari has been granted.

The suggested conflict between the decision of the Supreme Court of Kansas in this case and the decision of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Bank of America Nat'l Trust and Savings Ass'n, supra*, is non-existent. Anything said by the court in *Bank of America* concerning the issue here presented is clearly *obiter dicta*. This is made patently clear in the opinion on petition for rehearing when the court said:

> "The sole issue presented in this case by agreement of the parties was whether the sale under the

power contained in the mortgages gave the purchaser a title free and clear of federal tax liens." 265 F.2d at 869.

Thus any reference to redemption rights of the United States under 28 U.S.C. 2410 is dicta. No question concerning those rights had been presented.

A fundamental difference exists between the instant case and the four conflicting cases which gave rise to two writs of certiorari this Term. That difference is that each of those cases concerned *tax* liens of the United States. The fact that much confusion and difficulty exists concerning the extinguishment and priority of federal tax liens is well known to the Bar and to this Court and the determination of the questions presented in the four tax lien cases will serve as a guide in an area of the law fraught with problems. (See the Report of the Committee on Federal Tax Liens of the American Bar Association adopted by its House of Delegates in February, 1959.) Comparable confusion is non-existent concerning the question here presented. Furthermore, there is merit in the argument often propounded that the Government is entitled to greater protection when acting in its governmental function of tax-collecting than in a commercial function of money-lending. (Appellees do not concede, of course, that the United States needed any more protection than was available to it for complete protection of its rights in this case.)

It should perhaps be noted here that the one other case which the Government has asserted as being in conflict with the decision of the Kansas Supreme Court, *First National Bank and Trust Co.* v. *MacGarvie*, 22 N.J. 539, 126 A.2d 880, is a tax lien case and thus distinguishable from the case at bar. It is further distinguishable for the

reason that the United States there sought no affirmative relief after being summoned pursuant to 28 U.S.C. 2410. 126 A.2d at 882.

By way of a footnote in its Jurisdictional Statement (p. 15) the Government indicates that it is "advised" that the Farmers' Home Administration has made or insured presently outstanding loans of more than $120,000,000 which are secured by junior liens on real estate. If this assertion is intended to imply that there is some importance to the question presented because of the amount of money involved it must fall short of accomplishing that intended purpose. Initially, the precise question here cannot arise except in those states which give the mortgagor an exclusive statutory right of redemption for a fixed period following a judicial sale. The number of such states is limited. (Appellant's Statement, p. 16). What part of the $120,000,000 in outstanding loans is attributable to these states is not asserted by the Government. It must necessarily be a comparatively small sum. And judging from past experience as reflected by the dearth of cases, it seems highly unlikely that there will be any increase in default on mortgages followed by judicial sale and then redemption by the mortgagor when the United States is a second mortgagee. This is not a problem of great consequence since it arises so rarely. Unless and until the question ripens into one of substance the appeal should be dismissed.

Counsel for the appellant display real ingenuity in finding support for their position in the legislative history of 28 U.S.C. 2410(c). Try as we will we cannot read into the House Report the conclusions reached by the Government. Most of the referenced report concerns the "removal" provisions of the bill. The pertinent portion concerning redemption is as follows:

"The Senate amendment contains a clause allowing the court to stay proceedings on sale until the expiration of the next session of Congress. This was no doubt intended to allow Congress to appropriate money to enable the United States, if a junior lien holder, to bid enough at the sale to take care of prior liens and thus protect its own. In place of that the substitute bill provides that if a junior lien holder, the United States shall have a year in which to redeem. That does away with any necessity for a delay of sale. In many States of the Union there are now laws allowing junior lien holders as well as fee owners a year in which to redeem from execution and foreclosure sale of real estate. It is true that in other States no such equity of redemption exists. However, the provision adds nothing to the present difficulties in States which allow no redemption period, as under present conditions where present lien holders can not sue the United States, the rights of the United States never are barred by foreclosure decree." H.R. Rep. No. 2722, 71st Cong., 3d Sess. at p. 4.

We draw no real significance from this report at all. There surely is no clear expression of Congressional intent. If anything, it appears to us that the Conference Committee wished to provide a means for redemption in those states where no provision is made for redemption. There is no evidence that any conflict with existing state statutes was anticipated or that there was any intention to supersede an existing right created by state statute in a mortgagor.

The language of 28 U.S.C. 2410(c) would seem to us to imply the opposite conclusion from that reached by the United States. Certainly the section does not specifically say that a right of redemption is a condition to the filing of suit against the United States. The first sentence of subsection (c) states that a *judicial sale* in an action filed

pursuant to 28 U.S.C. 2410 shall have the same effect as to liens of the United States as is provided by local law. The third sentence of subsection (c) which is the one with which we are here specifically concerned states that where a *sale* of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year in which to redeem. "Sale" is not modified in that sentence by the word "judicial". It seems reasonable to assume then that what Congress had in mind was to provide a protection for the United States in those cases where the real estate was sold pursuant to a power in the mortgage or by other non-judicial sale. When sold by judicial sale, the rights of the United States were to be the same as any other lien holder. In Kansas then where only judicial sales are permitted following a mortgage foreclosure, G.S. Kan. 1949, 60-3107, the rights of the United States should be the same as those of any other person per subsection (a) of the federal statute. Any other person must, after foreclosure, bid at the sale to protect its interest. *Federal Land Bank v. Ludwig*, 157 Kan. 657, 158 Kan. 275, 143 P.2d 784, 146 P.2d 656. This the Government could and should have done. It is admitted that it was empowered to bid and buy to protect its interest. 7 U.S.C. (Supp. V) 1025. The fact that the Government failed to assert its rights in the appropriate manner and at the proper time should not now permit it to object to the fact that it has lost its security. (The United States of course continues to hold a valid personal judgment against the appellees.) The United States waited some four and one half months before attempting to redeem after the sale. One wonders what position appellant would take had the mortgagor exercised his right to redeem in the interim thus divesting appellant of its interest in the real estate. The United States then would have found itself in the same position in which it now finds itself.

As already noted, the first sentence in 28 U.S.C. 2410(c) provides that local law shall govern the rights of the United States in real property after judicial sale. If there is conflict between Kansas law and the federal statute as appellant asserts, there is likewise conflict between the first and third sentences of 28 U.S.C. 2410(c). The first sentence applies local law which gives the landowner the *exclusive* right to redeem for twelve months while the third sentence according to the appellant's argument gives the United States a right of redemption during this same period of time. It is hardly to be supposed that Congress intended to make contradictory provisions in the same act and yet if appellant's argument is correct that is precisely what Congress has done. Appellees argue, on the other hand, that the provisions of the federal statute may be harmonized and that the redemption right granted in the third sentence of 2410(c) has application following a non-judicial sale in those states providing no other means of redemption. The first sentence determines the rights after a judicial sale.

Of significance in the third sentence of subsection (c) of 28 U.S.C 2410 is the fact that the provision applies solely "where a sale is made to satisfy a lien prior to that of the United States." In this case, pursuant to the cross-petition in the state court by the United States, the sale of the real estate was made not only to satisfy a prior lien but to satisfy the lien of the United States as well. It was the order of the District Court of Edwards County, Kansas, that the real estate be sold and the proceeds be applied as follows:

"First: to the payment of the costs of this action, and of said sale;

Second: to the payment of all taxes which are a lien and payable on said premises at the time of said sale;

Third: to the payment of the first lien in favor of the plaintiff, John Hancock Mutual Life Insurance Company, a corporation;

Fourth: *to the payment of the second lien in favor of the defendant, the United States of America, and costs;*

Fifth: the balance, if any, to be paid to the person or persons entitled thereto under the direction of the court; together with accumulated interest on the liens to date of sale; . . ." (Italics added) (Abs. 30-31).

The fact that at the sale the high bid was insufficient for payment of the government's second lien is unfortunate but a remedy was available to the Government—appearance at the sale to insure a bid high enough to protect its interest. The relief sought by the United States in the state court was afforded it. The next step was up to the appellant. It simply failed to take that step.

It is obvious from appellant's jurisdictional statement and from its argument in the courts below that its position is based entirely on the proposition that 28 U.S.C. 2410 sets forth a fixed condition on the right to sue appellant, a condition which is absolute and creates rights in appellant superior to those given the mortgagor by state statute. Appellant overlooks the fact that when it came into the District Court of Edwards County, Kansas, it came in not only to be sued but to sue—to seek affirmative relief. This it was empowered to do pursuant to 7 U.S.C. 1014(f) (3) in which it is provided that the Farmers' Home Corporation "may sue and be sued in its corporate name in any court of competent jurisdiction." When the Farmers' Home Administration sought affirmative relief it must have been acting pursuant to the quoted authority. It sought relief in accordance with the procedure prescribed by Kansas statute. Its rights then should be governed by the laws of

the state under which it sought relief—the more so when in 28 U.S.C. 2410(c) Congress has said that a judicial sale shall have the "same effect" on liens held by the United States as is provided by local law. By local law the interest may be protected by bidding at the foreclosure sale. This the United States failed to do.

This Court has noted from time to time that when Congress establishes an agency authorized to engage in commercial and business transactions with the public and permits it to sue and be sued, "it cannot be lightly assumed that restrictions on that authority are to be implied." In the absence of a showing of a clearly contrary intention, "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." See *Federal Housing Administration* v. *Burr*, 309 U.S. 242 at 245. It appears then that the Farmers' Home Administration, engaged in commercial transactions, is not to be presumed to be in a superior status to other lienholders without an explicitly clear mandate from the Congress to that effect. Such mandate does not appear in 28 U.S.C. 2410(c) or in anything else presented by appellant.

As has already been indicated, if the question here presented were of any real substance, it would have been asserted by the Government long before this. Federal agencies holding second mortgages on Kansas real estate have been subjected to the Kansas redemption statutes many times in years past and, to our knowledge, without objection. In fact, counsel for the federal agencies have recognized the exclusive right of the mortgagor to redeem during the first twelve months after a judicial sale. See, *e.g.*, the motion for rehearing filed by the appellant, the

Federal Farm Mortgage Corporation, in *Federal Land Bank* v. *Shoemaker*, 155 Kan. 501, 126 P.2d 205, where counsel for the government agency said that appellant was seeking the right of redemption given it by Kansas statute "which right of redemption would, of course, be subject to the owner's exclusive right during the first twelve months of the redemption period." (Motion for Rehearing, Case No. 35554 in the Supreme Court of the State of Kansas, p. 4, now retained in the Kansas State Library, Topeka, Kansas.) In that case the Federal Farm Mortgage Corporation, a second mortgagee, was joined as a defendant, cross-petitioned, and asked for a finding that it was entitled to a right of redemption. It was recognized, however, that the mortgagor had the exclusive right to redeem for the first twelve months after the sale. To the same effect see *Federal Land Bank* v. *Ludwig*, 157 Kan. 657, 143 P.2d 784, in which, again, the Federal Farm Mortgage Corporation held a second mortgage on Kansas real estate, was joined as a defendant, cross-petitioned for foreclosure of its mortgage, and more than twelve months after the judicial sale sought to redeem. Counsel for the federal agency there recognized the validity of the Kansas statutes:

> " . . . the statute gives the defendant landowner an exclusive right to redeem the property at any time during the first twelve months following the sale by paying only the amount bid at the sale, with interest." (Abstract and Brief of Appellant in Case No. 35983 in the Supreme Court of the State of Kansas, p. 57, retained at the Kansas State Library, Topeka, Kansas.)

Thus it has been recognized by federal governmental agencies from time to time that the landowner enjoys a privilege in Kansas perhaps not accorded him elsewhere. There have been no catastrophic results when the land-

owner exercises that privilege and consequently the question here presented is not at this time of great significance. If the question had arisen often, or if the United States was not afforded a means of protecting its interest, the question might be of some importance. But absent either of those conditions the question presented is of no substantial importance.

CONCLUSION.

Since there is no real conflict in decisions on the question here presented, since this is the first time the question has ever been brought to this Court, and since the question is not of substantial importance, this Court should dismiss or affirm.

Respectfully submitted,

W. D. Jochems,
Harry L. Hobson,
500 Farmers & Bankers Life Bldg.,
Wichita, Kansas,
Attorneys for Appellees.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MORTON HOLLANDER,
WILLIAM A. MONTGOMERY,
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 565

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ARGUMENT

In our jurisdictional statement (pp. 10–13, 16), we referred to both the language and the legislative history of 28 U.S.C. 2410 which indicate that Congress intended the redemption provision in Section 2410(c) to take precedence over conflicting provisions of state law. We pointed to the decisions of the Court of Appeals for the Ninth Circuit[1] and the Supreme Court of New Jersey[2] which have recognized this

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[1] *United States* v. *Bank of America National Trust & Savings Assn.*, 265 F. 2d 862, pending on certiorari granted, October 12, 1959, No. 183, this Term.

[2] *First National Bank and Trust Co.* v. *MacGarvie*, 22 N.J. 539.

intent, and argued that the reasoning of the Supreme Court of Kansas in support of its contrary holding is fallacious.

Appellees, in their motion to dismiss or affirm, make no attempt to defend that holding on the grounds expressed by the Kansas Court. Instead, they assert the absence of a substantial federal question, attempt to distinguish the two conflicting cases, and advance entirely new reasons in support of the result reached below.

1. The redemption provision in Section 2410(c) directs in unqualified terms that:

> Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem.

Appellees contend that Congress intended this language to give the United States a right of redemption only in those situations where the senior lienor forecloses by way of a non-judicial sale (Appellees' Motion, pp. 7–9). Otherwise, they argue, the redemption sentence conflicts with the first sentence of subsection (c), which provides that a judicial sale in an action under the statute "shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated."

There is no foundation in the statutory language for construing the redemption provision as not applying to judicial proceedings. Section 2410(a) provides

that, under certain conditions prescribed "for the protection of the United States, the United States may be named a party in *any civil action or suit* * * *"[3] for the foreclosure of a mortgage upon property on which the United States has a lien. The remainder of the Section relates solely to the conditions under which such a "civil action or suit" may be maintained.[4]

Appellees are mistaken in their conclusion that this reading of subsection (c) creates a conflict between its first and third sentences. Statutory history shows conclusively that the redemption provision is intended as a proviso to the first sentence, *i.e.,* as an exception to the general rule that state law governs the effect of a judicial sale.

As originally enacted in Section 4 of the Act of March 4, 1931, 46 Stat. 1528, 1529, Section 2410(c) provided in pertinent part as follows:

> Except as herein otherwise provided, a judicial sale made in pursuance of a judgment in such a suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the law of the State, Territory, or District in which the land is situated * * *: *And provided further,* That where a sale is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem * * *.

[3] Emphasis added.

[4] The sole exception is subsection (d), which provides for administrative release of junior federal liens which have become worthless or unenforceable.

In this version there was thus no doubt that a judicial sale had the effect provided by local law "except as herein otherwise provided," one of which provisos was that the United States should have one year within which to redeem, despite the requirements of local law.

In the 1948 revision of the judicial code, Congress modified this language by deleting the above-quoted "exception" clause and the words "and provided further" which preceded the redemption provision. These changes were made solely in pursuance of the policy of eliminating superfluous language, which was followed throughout the code revision,[5] and effected no substantive changes in the statute. The only relevant portion of the Reviser's Note to Section 2410 states: "[c]hanges were made in phraseology."[6]

2. Appellees further urge that, in any event, the redemption provision does not apply where, as here, the Government seeks affirmative relief in an action under Section 2410. In their view, the authority for the Government's cross-petition in this action derives from the power of the Farmers' Home Corporation to sue and be sued in any state or federal court. See 7 U.S.C. 1014(f)(3). They conclude that the absence

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[5] As the House Judiciary Committee stated in its report on the revision (H. Rep. No. 308, 80th Cong., 1st Sess., p. 5):

"A clear and uniform style was an important aim of this revision. Concise, clear, and direct expressions were preferred to verbose, redundant and circuitous language."

[6] See note appended to 28 U.S.C. 2410; the Reviser's Notes were also appended to H. Rep. No. 308, 80th Cong., 1st Sess. In the latter report the House Judiciary Committee stated: "[t]he reviser's notes are keyed to sections of the revision and *explain in detail every change made in text*." [Emphasis added; *id.* at p. 7.]

of a redemption limitation on that broad authorization means that none is applicable here.

The Farmers' Home Corporation, however, has no connection with this litigation. The governmental litigant here is the United States, both in name and in substance.

Appellees are incorrect in their apparent assumption that the Farmers' Home Administration—which made the loans and took the mortgage giving rise to the Government's lien on the subject property—is identical with the Farmers' Home Corporation. In fact, the two are separate and distinct agencies. The Farmers' Home Corporation was created by Congress, as an independent suable body;[7] the Farmers' Home Administration was established by the Secretary of Agriculture, as an unincorporated agency within his department.[8] The Court has held that such an unincorporated agency within the Department of Agriculture has no legal existence apart from that of the United States. *United States* v. *Remund,* 330 U.S. 539.

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[7] Section 40 of the Bankhead-Jones Farm Tenant Act, 50 Stat. 527, 7 U.S.C. 1014.

[8] 11 Fed. Reg. 9007. The creation of the Farmers' Home Administration was sanctioned by the Conference Committee on H.R. 5991, 79th Cong., 2d Sess., the bill which became the Farmers' Home Administration Act of 1946, 60 Stat. 1062. The committee report explains that the conferees agreed not to use the Farmers' Home Corporation to carry out the functions and duties provided for in the bill, but, instead, "* * * to vest the necessary authority in the Secretary of Agriculture to be administered through the Farmers' Home Administration as an agency of the Department of Agriculture." 92 Cong. Rec. 10397.

No. 18

In the Supreme Court of the United States

October Term, 1960

United States of America, appellant

v.

John Hancock Mutual Life Insurance Co., George Hetzel and Grace Marie Hetzel

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MORTON HOLLANDER,
SHERMAN L. COHN,
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 18

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court of Edwards County, Kansas. The opinion of the Supreme Court of Kansas (R. 39-55) is reported at 185 Kan. 274, 341 P. 2d 1002.

JURISDICTION

The judgment of the Supreme Court of Kansas, based on a decision upholding the validity of a state statute that was challenged as repugnant to a law of the United States, was entered on July 10, 1959 (R. 39).

The notice of appeal to this Court was filed on October 6, 1959 (R. 61), and probable jurisdiction was noted on February 23, 1960 (R. 62). The jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

STATUTES INVOLVED

The pertinent statutes, 28 U.S.C. 2410 and Kansas General Statutes, 1949, 60-3107, 60-3438 to 60-3463, are set forth in the Appendix, *infra*, pp. 33-42.

QUESTION PRESENTED

Whether the United States, as the second mortgagee of real estate judicially foreclosed and sold to satisfy the first mortgagee's lien in a proceeding to which the United States was made a party under 28 U.S.C. 2410, can redeem within one year from the date of sale, as provided by 28 U.S.C. 2410(c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period.

STATEMENT

Appellee The John Hancock Mutual Life Insurance Company ("Insurance Company") instituted this foreclosure action in a Kansas state district court on September 3, 1957, by filing its petition against George and Grace Marie Hetzel, mortgagors, and numerous other potential claimants of interests in the property involved, including the United States (R. 2-10). Process was duly served on the United States, in the manner prescribed by the waiver of sovereign immunity contained in 28 U.S.C. 2410 (R. 17-18).

The Insurance Company alleged that it held the Hetzels' note for $25,000, secured by a mortgage consti-

tuting a first lien on certain Kansas real estate, on which note the mortgagors were in default. It sought a money judgment and asked that its mortgage be adjudged a first lien superior to any interests claimed by any of the defendants, that the mortgage be foreclosed, and that the property be sold to satisfy plaintiff's claim (R. 2-5, 9-10).

In its answer and cross-petition, the United States asserted that the Farmers' Home Administration held four separate promissory notes, three having been executed by both mortgagors and one by George Hetzel alone, on which a total of $12,944.83, with interest, was due. One of these notes, in the face amount of $10,565, was alleged to be secured by a second mortgage on the same property (R. 11-12). The Government acknowledged the priority of the Insurance Company's mortgage but prayed that the total amount of its claims be adjudged a second lien, inferior only to that of the Insurance Company (R. 13).

On December 4, 1957, the state court entered judgment in favor of the Insurance Company for $26,944.78, with interest and costs, and in favor of the United States for (1) $10,402.61, with interest and costs, on the note secured by the mortgage, and (2) a total of $2,642.39, with interest, on the other notes. Holding that the Insurance Company's and the Government's mortgages constituted first and second liens, respectively, the court ordered both to be foreclosed (R. 23-24).

A sheriff's sale was held on January 22, 1958, at which the Insurance Company bought in the property for the amount of its own judgment (R. 25-26, 42).

The United States did not bid at the sale (R. 42). By order of the district court the sale was confirmed on February 5, 1958, and the sheriff was directed to issue a certificate of sale to the purchaser, "fixing the period of redemption at eighteen months from the date of sale" (R. 25-26). The court further ordered that, if redemption was not made within that time, the sheriff should execute and deliver to the holder of the certificate of sale a deed conveying title to the property, free and clear of all claims of the defendants (R. 26).

On June 5, 1958—approximately four and one-half months after the sheriff's sale—the United States attempted to redeem the property, pursuant to the authority of 28 U.S.C. 2410(c). It submitted an affidavit and tendered the appropriate sum of redemption money to the clerk of the state court, in accordance with the procedure prescribed by Kansas General Statutes, 1949, 60-3451 (R. 27-28, 42). This tender was declined and the clerk refused to issue a certificate of redemption (R. 42).

The United States thereupon filed a motion for an order directing the clerk to issue to it a certificate of redemption, alleging that it had made a proper tender of redemption money to the clerk (R. 27-28). The Government based its entitlement to redeem on 28 U.S.C. 2410(c), which provides in relevant part that

> * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. * * *

It was asserted that this provision takes precedence over Section 60-3440 of the Kansas General Statutes, 1949, which stipulates that "[f]or the first twelve months after such sale, the right of the defendant owner to redeem is *exclusive* * * *" (emphasis added). Specifically, the Government's motion stated that (R. 27):

> * * * The provisions of Title 28, United States Code, Section 2410(c), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein.

In an order dated September 3, 1958 (R. 29), the district court overruled this motion on the ground that it was "without jurisdiction to grant the relief prayed for and [had] no jurisdiction of the subject matter of said motion."

The United States appealed from this order to the Supreme Court of Kansas.[1] In that court the Government pointed out that, as applied in this case, the redemption provisions of 28 U.S.C. 2410(c) conflict with

[1] The United States filed its notice of appeal to that court on October 30, 1958 (R. 29-30). On January 14, 1959, just before the expiration of the one-year period within which, under Kansas General Statutes, 1949, 60-3440, the mortgagors' right to redeem was exclusive, the mortgagors redeemed the property and the clerk of the district court issued a certificate of redemption to them (R. 44).

Section 60-3440 of the Kansas General Statutes, 1949. It contended that its redemption rights must therefore be determined by the federal rather than by the state statute, in accordance with the supremacy clause of Article VI of the United States Constitution. (R. 32, 48-49).

The Supreme Court of Kansas affirmed (R. 39-55). It held, first, that the Government's motion had properly raised the question of its right to redeem under 28 U.S.C. 2410(c). In this connection, the Supreme Court determined that the district court, despite its statement that it was without "jurisdiction" over the motion, had in fact assumed jurisdiction and had overruled the Government's motion on its merits (R. 45-46).[2]

Second, the Supreme Court ruled that the Government's redemption rights in this litigation are governed by state, rather than by federal, law. This decision was based on two federal court decisions[3] which were read

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[2] Appellees Hetzel argued in both the district court and the state Supreme Court that the Government's motion sought a modification of the foreclosure decree and that, under the Kansas rule that a judgment may not be modified after the term in which it is entered, the motion was untimely. In rejecting this contention, the Supreme Court concluded that the district court had not purported to determine the relative redemption rights of the parties when it issued its original foreclosure decree. For this reason, the court held that the motion did not ask for a modification of the decree and that the rule concerning the alteration of judgments was inapplicable (R. 44-46).

This determination of Kansas law by the highest court of the state is final and there is, therefore, no issue before this Court as to the jurisdiction of the courts below to entertain the Government's motion on its merits. *Metlakatla Indian Community* v. *Egan*, 363 U.S. 555; *Murdock* v. *City of Memphis*, 20 Wall. 590.

[3] *United States* v. *Cless*, 150 F. Supp. 687 (M.D. Pa.), affirmed, 254 F. 2d 590 (C.A. 3), and *United States* v. *Ryan*, 124 F. Supp. 1 (D. Minn.). See n. 11, *infra*, p. 27.

as authority for the proposition that "there is nothing in 28 U.S.C., § 2410 giving the government rights that are superior or preferential to the rights enjoyed by private citizens * * *" (R. 52). The court also quoted portions of the Government's mortgage which it thought relevant, and concluded (R. 53):

> Considering the terms of the government's mortgage which bound both it and the mortgagors, all the provisions of 28 U.S.C., § 2410, the appropriate Kansas statutes and the cases decided thereunder, * * * we are compelled to hold the trial court was correct in its final decree overruling the motion of the government for a certificate of redemption * * *.

SUMMARY OF ARGUMENT

28 U.S.C. 2410 (*infra*, p. 33) provides that the United States, under the conditions expressly included there for its "protection," may be named a party in any civil suit in a state or district court to foreclose a lien upon property in which the United States has or claims a lien. Among the protective conditions imposed upon this waiver of sovereign immunity is that, where a judicial sale is made to satisfy a lien prior to that of the United States, the latter "shall have one year from the date of sale within which to redeem." The issue in this case is whether the Government's statutory right to redeem can be defeated by a state statute which gives the mortgagor the exclusive right to redeem within that period.

A. Kansas law permits real property to be sold upon foreclosure of a mortgage only pursuant to court order,

and gives the mortgagor the exclusive right to redeem within one year thereafter. Junior liens cannot be extinguished through such judicial foreclosure, however, unless the junior lienors are joined in the foreclosure action. Thus, the first mortgagee was required under Kansas law to join the United States (the second lienor) in order to extinguish the Government's lien on the property. Of course, the United States could be joined in such an action only with its consent.

B. In 28 U.S.C. 2410, as originally enacted, Congress consented to suit against the United States only "upon [specified] conditions * * * prescribed for the protection of the United States * * *," including the provision that the United States "shall have" one year after a judicial foreclosure sale within which to redeem. The legislative history shows that this right of redemption was intended to protect the junior interests of the United States where the property was worth more than the amount of the senior lien. It was a substitute for a prior proposal which would have authorized a delay in the foreclosure sale to enable the Government to obtain a Congressional appropriation with which to bid at such a sale.

The federal right to redeem within one year would be ineffective to accomplish its intended purpose of protecting the United States in cases where the property being sold on foreclosure was worth more than the amount of the first lien, if it could be defeated by a state law which prevents junior lienors from redeeming during that period. Nor can the federal right of redemption be limited, as appellees seek to do, to situa-

tions where the senior lien is foreclosed through a non-judicial sale.

C. 1. Since the Kansas law denying junior lienors any redemption rights for one year after the sale directly conflicts with the federal law granting such right to the United States as a junior lienor, the Supremacy Clause of the Constitution requires that the federal law must prevail.

The recent decision in *United States* v. *Brosnan*, 363 U.S. 237, supports this conclusion. There, this Court, in "adopt[ing] as federal law state law governing divestiture of federal tax liens," stated (p. 241) that it "believe[d] it desirable" to do so "except to the extent that Congress may have entered the field." It further pointed out (p. 246, emphasis added) that "the Government is *guaranteed* a one-year right to redeem if the plaintiff proceeds under §2410 * * *." The instant case comes within the exception noted in *Brosnan,* since here Congress has "entered the field" by guaranteeing the Government one year within which to redeem. Accordingly, the Government's right to redeem must be determined by federal, not state, law. To apply Kansas law to defeat the Government's redemption rights would lead to the anomalous result that the United States could exercise its right to redeem only after the period provided therefor by Congress had expired. Neither the language, the legislative history, nor the basic purpose of Section 2410 supports appellees' suggestion that Congress merely intended to provide a means for redemption in those states which did not give such right to junior lienors.

Indeed, if the United States has no right to redeem, the necessary consequence is that the federal lien has not been discharged. For Kansas law permits a junior lien to be discharged only if the junior lienor is made a party, and Congress has permitted the United States to be sued only upon the condition that it have the right to redeem. If it does not have such right, sovereign immunity has not here been waived, and the United States was therefore not effectively made a party to the state proceedings.

2. While Congress has "entered the field" to guarantee the United States the right to redeem within one year (*Brosnan, supra*), it has not specified the procedures governing the exercise of such right. In the circumstances, we believe that, as a matter of federal law, state law may appropriately be looked to for filling in the details of the federal legislation, *i.e.*, determining the amount required for, and the manner of, redemption.

Since the federal right of redemption cannot be defeated by the state law, the Government's tender of redemption should have been accepted. However, the mortgagors could then have redeemed from the United States by reimbursing it for the amount it paid, plus its claim.

ARGUMENT

The Right That 28 U.S.C. 2410 Gives to the United States, as a Junior Lienor, to Redeem Within One Year Property Sold in Judicial Foreclosure Proceedings Cannot be Defeated by a Provision of State Law Giving the Mortgagor the Exclusive Right to Redeem Within That Period.

28 U.S.C. 2410 (*infra*, p. 33) provides that the United States, under the conditions expressly included there for its "protection," may be named a party in any civil suit in a state or district court to foreclose a lien upon property in which the United States has or claims a lien. Among the protective conditions imposed upon this waiver of sovereign immunity is that, where a judicial sale is made to satisfy a lien prior to that of the United States, the latter "shall have one year from the date of sale within which to redeem." The issue in this case is whether the Government's statutory right to redeem can be defeated by a state statute which gives the mortgagor the exclusive right to redeem within that period.

We shall show that, since under Kansas law a junior lien may be extinguished in judicial foreclosure proceedings only if the junior lien-holder is made a party thereto, the United States was a necessary party to the state proceedings; that Congress has expressly provided, as one of the conditions of permitting the United States, as a junior lienor, to be made a party to such proceedings, that it have the right to redeem within one year; and that the federal statute granting this right conflicts with the application to the United States of the provision of Kansas law which denies junior lienholders any redemption rights during that period. In these circumstances, the Supremacy Clause of the

Constitution requires that the federal, and not the state, right take precedence.

We emphasize that we are *not* contending that 28 U.S.C. 2410 gives the United States the *exclusive* right to redeem during the one-year period. We contend only that the state law provision cannot defeat the federally-created redemption right of the United States. We discuss this point *infra*, pp. 30-31.

A. KANSAS LAW PERMITS A JUNIOR LIEN TO BE EXTINGUISHED IN JUDICIAL FORECLOSURE PROCEEDINGS ONLY IF THE JUNIOR LIENOR IS MADE A PARTY THERETO. ACCORDINGLY, THE UNITED STATES, AS A JUNIOR LIENOR, WAS A NECESSARY PARTY TO THE STATE FORECLOSURE PROCEEDINGS.

Kansas law permits the sale of real property upon foreclosure of a mortgage only pursuant to a court order. Kan. Gen. Stat., 1949, 60-3107 (*infra*, p. 35); *Motor Equipment Co.* v. *Winters*, 146 Kan. 127, 131, 69 P. 2d 23; *Pool* v. *Gates*, 119 Kan. 621, 625, 240 Pac. 580; *LeComte* v. *Pennock*, 61 Kan. 330, 336, 59 Pac. 641; *Sanders* v. *Hall*, 74 F. 2d 399, 403 (C.A. 10). Upon the sale of the realty, the sheriff is required to furnish the purchaser a certificate stating that, unless the property is redeemed within eighteen months of the sale, the purchaser will be entitled to an absolute deed.[4] Kan. Gen. Stat., 1949, 60-3462, 60-3438. As stated by the Kansas Supreme Court in the instant case (R. 48),

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[4] Except in certain circumstances, not here applicable, where the right to redemption does not exist or is limited to six months. Kan. Gen. Stat., 1949, 60-3438, 60-3439.

the mortgagor may redeem the property at any time during the eighteen months. For the first twelve months, his right to redeem is exclusive. For the next three months, his right is concurrent with that of the junior lienholders, who may redeem from the purchaser and from each other. During the final three months, the mortgagor again has the exclusive right to redeem from whomever then owns the certificate of purchase. Kan. Gen. Stat., 1949, 60-3440, 60-3442, 60-3446, 60-3447.[5] Redemption by the mortgagor cuts off the redemption rights of junior lienholders. Upon the expiration of the redemption period, the holder of the certificate of purchase becomes the absolute owner of the property, free of all liens that were upon the property at the time of foreclosure. Kan. Gen. Stat., 1949, 60-3440, 60-3448, 60-3460.

It is also settled under Kansas law that junior liens cannot be eliminated by the judicial foreclosure of a senior lien unless the junior lienors are made parties to the foreclosure action. *Motor Equipment Co.* v. *Winters,* 146 Kan. 127, 69 P. 2d 23; *Stacey* v. *Tucker,* 123 Kan. 137, 254 Pac. 339; *Garber* v. *Bankers' Mortgage Co.,* 27 F. 2d 609, 610 (D. Kan.); cf. *Henne* v. *Wood,* 153 Kan. 673, 113 P. 2d 98; *John Hancock Mut. Life Ins. Co.* v. *Mays,* 152 Kan. 46, 49, 102 P. 2d 984.

[5] Redemption may be accomplished by paying to the clerk of the trial court an amount equal to that paid by the then holder for the certificate of purchase, plus the amount of such holder's own claim and the sums paid by him for taxes, insurance, and interest. Kan. Gen. Stat. 1949, 60-3443.

Thus, under Kansas law, the Insurance Company (the first lienor) was required to join the United States (the second lienor) as a party to the judicial foreclosure proceedings in order to extinguish the Government's lien upon the property. And, of course, the United States could be joined in such an action only with its consent. *United States* v. *Brosnan,* 363 U.S. 237; *United States* v. *Alabama,* 313 U.S. 274; *Minnesota* v. *United States,* 305 U.S. 382; *The Siren,* 7 Wall. 152.

B. IN 28 U.S.C. 2410, CONGRESS HAS CONSENTED TO THE UNITED STATES BEING MADE A PARTY TO STATE JUDICIAL FORECLOSURE PROCEEDINGS ONLY ON THE CONDITION THAT IT CAN REDEEM THE PROPERTY WITHIN ONE YEAR AFTER THE FORECLOSURE SALE.

Congress first consented to the United States being made a party to state judicial foreclosure proceedings in 1931, 46 Stat. 1528, now codified as 28 U.S.C. 2410, *infra,* p. 33. Congress there provided:

> That, upon the conditions herein prescribed for the protection of the United States, the consent of the United States be, and it is hereby given, to be named a party in any suit * * * in any State court having jurisdiction of the subject matter, for the foreclosure of a mortgage or other lien upon real estate, for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises involved.[5a]

[5a] The changes between the provision as originally enacted and as now set forth in 28 U.S.C. 2410 (*infra,* p. 33) are the result of amendments in 1942 (56 Stat. 1026) and the 1948 revision of the Judicial Code (see *infra,* p. 23).

The legislative history shows that this statute was designed to eliminate the "unfair disadvantage" to which private lienors had been subjected "because of inability to join effectively the Government as a party to judicial [foreclosure] proceedings." *United States* v. *Brosnan,* 363 U.S. at 248. For, prior to that time, a first lienor—such as the Insurance Company in this case—had found it

> impossible * * * to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. * * *
>
> The purpose of this bill is to provide a simple and just method of proceeding in such cases * * *.

H. Rept. No. 95, 71st Cong., 2d Sess., pp. 1-2;[6] S. Rept. No. 351, 71st Cong., 2d Sess., p. 2.

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[6] The entire pertinent portion of the House Report is as follows:

> This legislation has been recommended for a number of years by the American Bar Association through its committee on removal of Government liens on real estate, the United States League of Local Building and Loan Associations, and by numerous land title companies, in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortgagee owes no obligation either legal or moral. In such circumstances the mortgagee finds himself at an impasse. It is impossible for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove

While Congress in Section 2410 "lift[ed] the bar of sovereign immunity which had theretofore been considered to work a particular injustice on private lienors" (*Brosnan, supra,* at p. 246), it did not do so unqualifiedly. On the contrary, the consent to suit against the United States was given only "upon the conditions herein prescribed for the protection of the United States * * *." The power of Congress to impose appropriate conditions upon a waiver of the Government's immunity from suit is, of course, well settled. *Soriano* v. *United States,* 352 U.S. 270, 276-277; *Munro* v. *United States,* 303 U.S. 36, 41; *McElrath* v. *United*

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the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien, a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment.

The purpose of this bill is to provide a simple and just method of proceeding in such cases * * *.

* * * * *

This bill will provide relief from a situation that has caused a great deal of injustice to innocent holders of liens against real estate. The number of liens filed under the revenue laws has been steadily growing * * *. The law provides and equity dictates that the Government's lien in such circumstances should have a junior status, yet under the present practice the inability of the plaintiff to bring the United States in as a party to the proceeding to foreclose or have execution and sale on a court judgment where a Government lien is found to have been placed upon the property subsequently to the time of the plaintiff's encumbrance ties the hands of a prior lien-holder by making it impossible for him to grant a clear title to the property and thus for no just reason deprives him of the benefits of his security or court judgment as the case may be.

States, 102 U.S. 426, 440; *Young* v. *United States*, 95 U.S. 641; *Nichols* v. *United States*, 7 Wall. 122, 126.

Congress imposed a number of conditions "for the protection of the United States" in this legislation. It provided for service of the complaint upon both the Attorney General and the United States attorney, gave the United States 60 days within which to answer, authorized the United States to remove a state court suit to a federal court, and gave the United States the right to seek affirmative relief and to bid at the foreclosure sale. In addition, it provided that

> where a sale is made to satisfy a lien prior to that of the United States, the United States *shall have* one year from the date of sale within which to redeem [emphasis added].

The legislative history shows that this right of redemption was provided in order to protect the junior interests of the United States where the property was worth more than the amount of the senior lien. A bill to allow the United States to be joined in a foreclosure action instituted by a senior lienor was first passed by the Seventieth Congress. 70 Cong. Rec. 1450, 4539. This bill contained no provision by which the United States could protect its junior lien interest in the foregoing circumstances. See S. Rept. No. 1830, 70th Cong., 2d Sess.; H. Rept. No. 2744, 70th Cong., 2d Sess. The bill was killed by a pocket veto. See 72 Cong Rec. 1998.

In the Seventy-first Congress, the Judiciary Committee of the House reported a bill (H.R. 980) identical to that passed in the previous Congress. See H. Rept. No. 95, 71st Cong., 2d Sess. p. 1; 72 Cong. Rec. 1998. During the debate on the floor of the House, a question was raised as to whether, under the scheme of H.R. 980, the United States could protect its rights in property worth more than the senior lien (72 Cong. Rec. 3120, 3121):

> Mr. Bloom. How could the United States protect itself in a subordinate lien against any property if it should go to a foreclosure? If it goes to a foreclosure, if I may be permitted to add to my question, the United States, to protect its second lien, would have to get an appropriation. It could not go in and buy and protect its first mortgage.
>
> Mr. Graham. We would have nothing to do with the detail of how the United States would protect itself. The United States has its status the same as any other second-lien creditor, citizen, or corporation. Why should it be put in a different position?
>
> Mr. Bloom. The United States is not in the same position, because it can not go in and buy the first lien to protect its second lien. It has not the money or the right to do it.
>
> Mr. Graham. It ought not to do it, either.
>
> Mr. Bloom. It can not do it.
>
> Mr. Graham. And it will not do it.

* * * * *

Mr. Bloom. I asked the chairman of the committee [Mr. Graham] a question with reference to the chance of the Government to protect itself in a subordinate lien on a piece of property in a case where it would not be within the power of the Government at any time to protect the subordinate lien. If a person wanted to be dishonest, the Government could not come in and protect its lien at any time without first coming to Congress to get an appropriation to buy and protect the first mortgage in order to protect the second mortgage.

Mr. Hawley. My understanding is that if the Government has a lien and there is a prior incumbrance on the property——

Mr. Bloom. If the Government has a subordinate lien——

Mr. Hawley. And proceedings are taken to protect the first lien, the Government's case will be considered, and if the property is worth sufficient not only to pay the prior lien or liens but also to pay the Government lien, in whole or in part, the Government would receive payment in whole or in part.

Mr. Bloom. If the holder of the first lien wanted to be dishonest, he would bid less than what the first lien amounts to, get the property at a low figure, and the Government would get nothing.

Mr. Hawley. The Government has no right to bid in the property.

The bill passed the House with no change pertinent to this question. 72 Cong. Rec. 3122. The Senate, however, added a new section authorizing (1) the United

States to bid at the foreclosure sale and (2) a delay of the sale until the completion of the next succeeding session of Congress so as to allow the Government time to obtain a Congressional appropriation with which to make its bid. See S. Rept. No. 351, 71st Cong., 2d Sess., pp. 1-2; 72 Cong. Rec. 7020.

This addition was stricken by the Conference Committee and the redemption provision now in Section 2410(c) was substituted. In rejecting the Senate proposal for protecting the rights of the United States as a junior lien holder,[7] the Conference Committee concluded that a federal redemption provision was a more effective method for protecting those rights. It stated (H. Rept. No. 2722, 71st Cong., 3d Sess., p. 4):

> * * * The Senate amendment contains a clause allowing the court to stay proceedings on sale until the expiration of the next session of Congress. This was no doubt intended to allow Congress to appropriate money to enable the United States, if a junior lien holder, to bid enough at the sale to take care of prior liens and thus protect its own. In

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[7] It should be noted that the substitute bill gave "the United States, where it owns the first lien, authority to ask for affirmative relief in the form of foreclosure of its lien, and to bid at the sale up to the amount of its claim and expenses of sale." H. Rept. No. 2722, 71st Cong., 3d Sess., p. 4. This provision, now found in Section 2410(c), reads as follows:

> * * * where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

> place of that the substitute bill provides that if a junior lien holder, the United States shall have a year in which to redeem. That does away with any necessity for a delay of sale.

In sum, this legislative history establishes that Congress intended in Section 2410 to provide a procedure which would guarantee the United States an effective method for protecting its junior interests in cases where the property was worth more than the senior lien. To accomplish this, Congress provided that a judicial sale of property on which the United States has or claims any lien "is to have the same effect [upon the discharge of the liens] as it would have under local law, *but* the United States is given one year to redeem." *United States* v. *Brosnan,* 363 U.S. at 246 (emphasis added). The right to redeem, however, would be ineffective to protect the interest of the United States if it could be defeated by a provision of state law which prevents junior lienors from redeeming during that period, since this would wipe out the junior federal interest even where the property is worth more than the first lienor's claim.

Appellees contend (Motion to Dismiss or Affirm, pp. 7-9), however, that the statute gives the United States a right of redemption only in those situations where the senior lienor forecloses through a non-judicial sale. Otherwise, they argue, the redemption sentence conflicts with the first sentence of subsection (c), which provides that a judicial sale in an action under the statute "shall have the same effect respecting the discharge of the property from liens and encumbrances

held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated."

There is no foundation in the statutory language for construing the redemption provision as not applying to judicial proceedings. Section 2410(a) provides that, under certain conditions prescribed "for the protection of the United States, the United States may be named a party in *any civil action or suit* * * * " (emphasis added) for the foreclosure of a mortgage upon property on which the United States has a lien. The remainder of the section relates solely to the conditions under which such a "civil action or suit" may be maintained.

Appellees are mistaken in their conclusion that this reading of subsection (c) creates a conflict between its first and third sentences. The statutory history shows conclusively that the redemption provision is intended as a proviso to the first sentence, *i.e.*, as an exception to the general rule that state law governs the effect of a judicial sale.

As originally enacted on March 4, 1931, 46 Stat. 1528, Section 2410(c) read in pertinent part as follows:

> Except as herein otherwise provided, a judicial sale made in pursuance of a judgment in such a suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the law of the State, Territory, or District in which the land is situated, * * *: *And provided further*, That where a sale is made

> to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. * * * [Emphasis in original.]

In this version there was thus no doubt that a judicial sale had the effect provided by local law "[e]xcept as herein otherwise provided," one of which provisos was that the United States should have one year within which to redeem, despite the requirements of local law.

In the 1948 revision of the federal Judicial Code, Congress modified this language by deleting the above-quoted "exception" clause and the words "[*a*]*nd provided further*" which preceded the redemption provision. These changes were made solely in pursuance of the policy of eliminating superfluous language, which was followed throughout the code revision,[8] and were not intended to effect any substantive changes in the statute. As the only relevant portion of the Reviser's Note to Section 2410 indicates, "[c]hanges were made in phraseology."[9] Thus, the 1948 revision of 28 U.S.C. 2410 made no substantive changes in the redemption

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[8] As the House Judiciary Committee stated in its report on the revision (H. Rept. No. 308, 80th Cong., 1st Sess., p. 5):

> A clear and uniform style was an important aim of this revision. Concise, clear, and direct expressions were preferred to verbose, redundant and circuitous language.

[9] See note appended to 28 U.S.C. 2410; the Reviser's Notes were also appended to H. Rept. No. 308, 80th Cong., 1st Sess. In the latter report the House Judiciary Committee stated:

> The reviser's notes are keyed to sections of the revision and *explain in detail every change made in text*. [Emphasis added; *Id.* at p. 7.]

provision, which continues as a qualification of the Government's consent to be sued.[10]

C. SINCE THE FEDERAL LAW GRANTING THE UNITED STATES, AS A JUNIOR LIENHOLDER, ONE YEAR WITHIN WHICH TO REDEEM IS IN DIRECT CONFLICT WITH THE KANSAS LAW DENYING JUNIOR LIENHOLDERS THE RIGHT TO REDEEM DURING THAT PERIOD, THE FEDERAL LAW MUST PREVAIL.

1. As we have shown, under Kansas law the state foreclosure proceedings would not have been effective to discharge the junior lien of the United States unless the latter were made a party to such proceedings; and Congress permitted the United States to be made a party only on the condition that it have one year after the foreclosure sale within which to redeem. Kansas law, however, denies junior lienors any right to re-

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[10] Appellee further contends (Motion to Dismiss or Affirm, p. 8) that, since the Government was empowered by 7 U.S.C. 1025 to bid at the foreclosure sale, its failure to do so bars it from exercising its redemption rights under 28 U.S.C. 2410(c). 7 U.S.C. 1025 authorizes the Secretary of Agriculture, who exercises supervisory power over the Farmers' Home Administration (the federal agency from which appellees Hetzel obtained their loans, and to which they executed their second mortgage), "to bid for and purchase at any foreclosure or other sale or otherwise acquire property pledged, mortaged, conveyed, attached, or levied upon to secure the payment of any * * * indebtedness [owing by virtue of any loans made under any programs administered by the Farmers' Home Administration]." This provision, however, is separate and distinct from Section 2410(c), and there is nothing in either its language or its legislative history that indicates that it was intended as a limitation upon the broad and unqualified right of redemption given to the United States by Section 2410 when it is made a party "in any civil [foreclosure] suit in any district court * * * or in any State court * * *."

deem during that period, since it gives the mortgagor the exclusive right to do so. Thus, the attempted application of the Kansas law in this case to defeat the federally-created redemption right of the United States produces a clear and direct conflict between the federal and state law.[f] Under the Supremacy Clause of the Constitution (Article VI), the federal law must prevail.

The recent decision of this Court in *United States* v. *Brosnan,* 363 U.S. 237, fully supports this conclusion. There, in holding that Federal tax liens on real property, junior to defaulted mortgages held by others on the same property, were "effectively extinguished by state proceedings to which the United States was not, nor was required under state law to be, a party" (pp. 238-239), this Court deemed it appropriate "to adopt as federal law state law governing divestiture of federal tax liens, *except to the extent that Congress may have entered the field*" (p. 241, emphasis added). In discussing the statutory provisions "for the enforcement and extinguishment of federal liens" (p. 242), the Court pointed out (p. 246, emphasis added) that

> [u]nder § 2410, a judicial sale is to have the same effect as it would have under local law, but * * * the Government is *guaranteed* a one-year right to redeem if the plaintiff proceeds under § 2410 * * *.

This "guaranty" to the United States of the right to redeem within one year after sale brings this case within the exception noted in *Brosnan,* that state law will not control the "extinguishment of federal liens" where "Congress may have entered the field." There

is thus present here the "congressional direction" (p. 242) in favor of applying federal law that was found lacking in *Brosnan*. Indeed, to apply Kansas law to define the Government's redemption rights would lead to the anomalous result that the United States could exercise its right to redeem only after the period provided therefor by Congress had expired.

The legislative history of Section 2410 shows that Congress was aware that there would be situations in which the right of redemption granted to the United States would be inconsistent with the rights of junior lienors under state law. The Conference Committee pointed out (H. Rept. No. 2722, 71st Cong., 3d Sess., p. 4):

> In many States of the Union there are now laws allowing junior lien holders as well as fee owners a year in which to redeem from execution and foreclosure sale of real estate. It is true that in other States no such equity of redemption exists. However, the provision adds nothing to the present difficulties in States which allow no redemption period, as under present conditions where present lien holders can not sue the United States, the rights of the United States never are barred by foreclosure decree.

While the conflict between state and federal law that concerned the Conference Committee was the granting of a federal redemption right where the state does not provide it for junior lienors, the same considerations are equally applicable where the state does grant such a right, but on terms inconsistent with those

provided for the federal right. In either situation, the federally-created right takes precedence over the inconsistent state-created right, as the Committee impliedly recognized.

Neither the language of Section 2410, nor its legislative history, nor its basic purpose, supports appellees' suggestion (Motion to Dismiss or Affirm, p. 7) that Congress merely "wished to provide a means for redemption in those States where no provision is made for redemption." On the contrary, effectuation of the basic Congressional purpose of providing a remedy adequate "for the protection of the United States" in cases where the value of the property involved exceeds the amount of the first lien (*supra*, pp. 17-21), requires that the broad language in Section 2410 be construed as giving the United States an absolute right of redemption in any case in which its junior lien is divested pursuant to state judicial foreclosure proceedings.[11] As

[11] Neither of the two federal cases relied upon by the court below (*United States* v. *Ryan*, 124 F. Supp. 1 (D. Minn.), and *United States* v. *Cless*, 150 F. Supp. 687 (M.D. Pa.), affirmed, 254 F. 2d 590 (C.A. 3) (R. 49-52)) is in point. *Ryan* held only that a federal tax lien was invalid because state recording statutes had not been followed; its reasoning was subsequently rejected by the Eighth Circuit in *United States* v. *Rasmuson*, 253 F. 2d 944, 946. *Cless* held (254 F. 2d at 592) that 28 U.S.C. 2410 "was not intended to require the joinder of the United States, but was merely a waiver of sovereign immunity by a consent to be sued in those situations where the foreclosing creditor might be required to join the government as junior lienor under local law" Since the state law there involved (Pennsylvania) does not require the joinder of junior lienors, the court ruled that the foreclosure sale of a first mortgage extinguished the second mortgage of the United States, even though the latter had not been made a party to the proceedings. That was also the situation in *Brosnan*, which involved Pennsylvania law. Unlike Pennsylvania, however, Kansas is one of the "states where it is necessary to join the junior lienors" (254 F. 2d at 593)

indicated, the Supremacy Clause precludes the application of the inconsistent Kansas law to defeat this right.[12]

The only other reported case which has considered the redemption provision of Section 2410(c) fully supports our position. In *First National Bank and Trust Co.* v. *MacGarvie*, 22 N.J. 539, 126 A. 2d 880, the United States, which held a junior tax lien on New Jersey real estate, had been made a defendant in a foreclosure action brought by a first mortgagee. Within a year after the foreclosure sale, the United States attempted to redeem pursuant to 28 U.S.C. 2410. Under New Jersey law, a junior lienor could not have redeemed at that

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(see *supra*, p. 13), and the United States was therefore here made a party.

The court also relied upon *Federal Land Bank* v. *Ludwig*, 157 Kan. 657, 143 P. 2d 784, but it has no pertinence. It concerned only the right of a junior lienor to redeem under Kansas law between the twelfth and fifteenth months after the sale. The court held that the junior lienor had such a right. No mention was made of 28 U.S.C. 2410.

[12] There is no merit to the implication by the Supreme Court of Kansas that the Government in its mortgage contract agreed to be bound by state law despite the redemption provision of Section 2410(c). See R. 46-47, 53. While it is true that the mortgage is entitled "Real Estate Mortgage for Kansas," and that the "laws of the State of Kansas" are referred to in paragraph 23 thereof, the instrument also stipulates "that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power, or remedy of Mortgagee, *whether herein set out or conferred by law* * * *" (R. 35, 37, 38; emphasis added). The designation of the contract as a "Kansas" mortgage and the reference to state law in paragraph 23 are, therefore, not to be construed as an adoption of any provision of state law in conflict with Section 2410(c), which expressed "the federal policy to protect the treasury and to promote the security of federal investment * * *." *United States* v. *View Crest Garden Apts.*, 268 F. 2d 380, 383 (C.A. 9), certiorari denied, 361 U.S. 884; and see *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294.

time. 22 N.J. at 545; and see, New Jersey Stat. Ann., 2A:50-4. However, the Supreme Court of New Jersey —although holding that the Government had not made a sufficient tender—recognized the Government's right to redeem despite the absence of such a right under state law. It declared (22 N.J. at 547):

> We recognize the federal right and will give it effect where a sufficient tender is made within the time prescribed by *section* 2410(*c*). [Emphasis in original.]

Indeed, if the decision of the Supreme Court of Kansas that the United States has no right of redemption is correct, the necessary consequence is that the federal lien has not been discharged by the state foreclosure proceedings. For a judicial sale is effective to discharge "the property from liens and encumbrances held by the United States" (28 U.S.C. 2410(c) *infra*, p. 33) only if the conditions imposed by Congress upon the waiver of sovereign immunity have been met, including the one-year right of redemption. If the United States has no such right of redemption here, there has been no effective waiver of sovereign immunity, and the United States was therefore not validly made a party to the state proceedings. Cf. *Vincent* v. *P. R. Matthews Co.,* 126 F. Supp. 102, 105 (N.D. N.Y.), and *City Bank of Anchorage* v. *Eagleston,* 110 F. Supp. 429, 430 (D. Alas.).[13] In such circumstances, Kansas

[13] These cases respectively held that non-compliance with the provisions of Section 2410 giving the United States the right of removal to a federal court, and requiring that the complaint state

law itself provides that the junior lien has not been discharged.

2. Although Congress has "entered the field" to guarantee the United States one year within which to redeem (*Brosnan, supra*), it has not similarly spoken with respect to the manner in which such right of redemption should be exercised. In these circumstances, we believe that, as a matter of federal law, state law may appropriately be looked to as a source for filling in the details of the federal legislation. Cf. *Board of County Commissioners* v. *United States*, 308 U.S. 343, 349-350; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 210. The federal law will thus take precedence over the state law only to the extent necessary for the effectuation of the federally-created rights.

We do not contend that the federal redemption right is exclusive in the sense that its mere existence precludes the exercise of state-created redemption rights. Rather, as we stated in the state trial court, the federal right is "coexistent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein" (R. 27). It is coexistent in the sense that, during the one-year period, (1) the mortgagor still has the exclusive right to redeem as against all junior lienors other than the United States; (2) if the mortgagor does so redeem, it is fully effective if the United States does not exercise its redemption

"with particularity" the interest of the United States, would preclude the United States being made a party to the lien enforcement proceedings.

rights during the year; and (3) if the United States redeems, the mortgagor may, in turn, redeem from it, upon the same terms and conditions that state law prescribes for the redemption from other junior lienors.

However, we submit that when the United States did elect to redeem within the year, the clerk of the Kansas district court was required to accept the Government's tender, and to issue a certificate of redemption to it. The mortgagor could then redeem from the Government by tendering the amount the latter paid upon redemption plus the amount of its claim, "and including all sums paid * * * for taxes, insurance premiums, and interests or sums due," in accordance with Kan. Gen. Stat., 1949, 60-3443.

We further think it appropriate to look to state law to determine the amount which the Government must pay, and the manner in which the tender of payment should be made, in order to effect redemption under Section 2410(c). For this reason, the tender of redemption which the Government made to the clerk of the court below was made "in keeping with the provisions of Section 60-3451, General Statutes of Kansas, 1949" (R. 27). This tender comported with the decision in the *MacGarvie* case, *supra*, which held that the amount required to effect redemption under 28 U.S.C. 2410(c) should be measured by the normal state-law rule. While recognizing the Government's right to redeem, the Supreme Court of New Jersey held that "the amount necessary to effectuate the right is governed by the *lex rei sitae*." 22 N.J. at 547.

CONCLUSION

As stated above (*supra*, p. 5, n. 1), the mortgagors, appellees Hetzel, were issued a certificate of redemption on January 14, 1959. In order to accord the Government the full relief to which it is entitled, this certificate of redemption should be cancelled. The United States should be permitted to redeem by again tendering its check to the clerk of the district court of Edwards County, Kansas, for the amount necessary under Kan. Gen. Stat., 1949, 60-3451. The clerk should then be directed to issue a certificate of redemption to the United States, which will take precedence over all prior redemption proceedings had in this action, and which will give the United States all the rights which would have flowed from such a certificate had it been issued when first applied for.

The judgment of the Supreme Court of Kansas, affirming the trial court's denial of the Government's motion for an order directing the clerk to issue to it a certificate of redemption, should be reversed and the cause remanded with instructions to permit the United States to redeem the property in accordance with the procedure outlined above.

Respectfully submitted,

J. Lee Rankin,
Solicitor General.
George Cochran Doub,
Assistant Attorney General.
Morton Hollander,
Sherman L. Cohn,
Attorneys.

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APPENDIX

1. 28 U.S.C. 2410 provides as follows:

Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the

property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptrol-

ler General who may issue a certificate releasing the property from such lien.

2. The pertinent provisions of the Kansas General Statutes, 1949, are as follows:

60-3107. Judgment in action to enforce mortgage, deed of trust, or other lien or charge; sale of property. In actions to enforce a mortgage, deed of trust, or other lien or charge, a personal judgment or judgments shall be rendered for the amount or amounts due, as well to the plaintiff as other parties to the action having liens upon the mortgaged premises by mortgage or otherwise, with interest thereon, and for the sale of the property charged and the application of the proceeds, or such application may be reserved for the further order of the court; and the court shall tax the costs and expenses which may accrue in the action, apportion the same among the parties according to their respective interests, to be collected on the order of sale or sales issued thereon. When the same mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county shall make sale of the lands situated in the county of which he is sheriff. No real estate shall be sold for the payment of any money, or the performance of any contract or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale.

60-3438. Deed or certificate to purchaser of real estate; waiver or right of redemption void. After sale by the sheriff of any real estate on execution, special execution or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but

if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount of the costs up to said date, stating that, unless redemption is made within eighteen months thereafter according to law, that the purchaser or his heirs or assigns will be entitled to a deed to the same: *Provided,* That any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void.

60-3439. Right of redemption by defendant owner; junior lien holders; agreements to shorten period or waiver by corporations. The defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs and taxes, as provided for in this act, at any time within eighteen months from the day of sale as herein provided, and shall in the meantime be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned, or are not occupied in good faith, the period of redemption for defendant owner shall be six months from the date of sale, and all junior lienholders shall be entitled to three months to redeem after the expiration of said six months: *Provided,* That the right of redemption shall not apply to oil and gas leases, or oil and gas leasehold estates. In all sales of oil and gas leases under order of sale the property shall be appraised as in the case of sales of real estate on execution, and no such property shall be sold for less than two-thirds of the appraised value thereof: *And provided further,* That any corporation organized under the laws of the United States, the District of Columbia or any state of the United States, may, as mortgagor, agree in the mort-

gage instrument to a shorter period of redemption than eighteen months, or may wholly waive the period of redemption as against said corporation mortgagor only and all such agreements when so made shall be fully binding on such mortgagor.

60-3440. Redemption by lien creditor of defendant, when. For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendant and owner whose demand is a lien upon such real estate may redeem the same at any time within fifteen months from the date of sale. A mechanic's lien, before decree enforcing the same, shall not be deemed such a lien as to entitle the holder to redeem.

60-3441. Creditors who may redeem. Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for the redemption of creditors may redeem. A mortgagee may redeem upon the terms hereinafter prescribed before or after the debt secured by the mortgage falls due.

60-3442. Creditors who may redeem from each other. Creditors having the right of redemption may redeem from each other within the time heretofore prescribed, and in the manner hereinafter provided.

60-3443. Terms of redemption; rights of parties. During the period allowed for the redemption of real property from sale under execution, special execution or order of sale, the holder of the certificate of purchase may pay the taxes on the lands sold, insurance premiums on the buildings thereon, and interest or sums due, upon any prior lien or encumbrance thereon; and upon the redemption of the premises from such sale the holder of the certificate shall be entitled to repayment of all sums thus paid

by him, together with interest thereon. The terms of redemption shall be in all cases the reimbursement of the amount paid by the then holder of the certificate of purchase, added to his own claim, and including all sums paid by him for taxes, insurance premiums, and interest or sums due, as shown by receipts or vouchers to be filed in the office of the clerk of the district court, with interest, together with costs, subject to the exemption contained in the next section. But where a mortgagee or other lienholder, as provided for in this code, whose claim is not yet due, is the person from whom redemption is to be made, he shall receive in payment the full amount paid by him, as stated in his certificate of redemption, together with interest, together with the actual amount of his claim at the date of redemption.

60-3444. Senior creditor redeeming from junior creditor; amount required. When a senior creditor redeems from a junior, the senior creditor shall only be required to pay the amount of those liens which are paramount to his own, and with interest and costs appertaining to the same.

60-3445. Junior creditor may prevent redemption by senior creditor. A junior creditor may prevent redemption by the senior creditor or the holder of the paramount lien by paying off the lien, or depositing with the clerk of the district court beforehand the amount necessary to remove said lien.

60-3446. Junior creditor may redeem from senior creditor. A junior judgment creditor or lienholder may redeem from a senior judgment creditor or lienholder by paying to the party himself or to the clerk of the district court the full sum due said senior creditor or lienholder, with interest and costs, and shall become thereby vested with full title to the judgment so redeemed from and to all liens of such judgment.

60-3447. Time in which creditors may redeem from each other. After the expiration of fifteen months from the day of sale, the creditors can no longer redeem from each other, but the defendant owner may still redeem at any time before the end of the eighteen months as aforesaid.

60-3448. Effect of failure of debtor to redeem. If the defendant or holder of the legal title fails to redeem as herein provided, the purchaser or the creditor who has last redeemed prior to the expiration of the fifteen months aforesaid will hold the property absolutely.

60-3449. Same; effect of redemption by creditor. In case it is thus held by a redeeming creditor, his lien and the claim out of which it arose will be held to be extinguished, unless he pursue the course pointed out in the next section.

60-3450. Same; creditor may file statement of amount credited on his claim; time for filing. If he is unwilling to hold the property and credit the defendant owner therefor with the full amount of his lien, he must, within ten days after the fifteen months aforesaid, file with the clerk of the district court a statement of the amount that he is willing to credit on his claim; and in order to redeem said real estate, the defendant shall only be bound to pay the amount so stated.

60-3451. Mode of redemption; affidavit; receipt and entry by clerk. The mode of redemption as herein provided is by paying the money into the office of the clerk of the district court for the use of the persons thereunto entitled. The person so redeeming, if not the defendant owner in execution or order of sale, must also file his affidavit or that of his agent or attorney, stating as nearly as practicable the amount still unpaid due on his claim. The clerk

shall give him a receipt for the money, stating the purpose for which it is paid. He must also enter the same upon a book kept for that purpose, with a minute of such redemption, the amount paid, and the amount of the lien of the last redemption or as sworn to by him.

60-3452. Last creditor redeeming entitled to assignment of certificate of purchase. The last creditor who redeems prior to the fifteen months shall be entitled to receive an assignment of the certificate of purchase issued by the sheriff as hereinbefore directed.

60-3453. Redemption of property sold in parcels. Whenever the property has been sold in parcels, any distinct portion thereof may be redeemed by itself, and if creditors other than the original purchaser have redeemed, the amount of their claim shall be added to each parcel pro rata in proportion to the amount for which the same was originally sold.

60-3454. Redemption of undivided portion. When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately.

60-3455. Owner's right of redemption may be transferred; not subject to execution. The rights of the defendant owner in relation to redemption may be assigned or transferred, and the purchaser or assignee thereof shall have the same right of redemption as the defendant owner; but the right of redemption shall not be subject to levy or sale on execution.

60-3456. Holder of legal title has same right of redemption as defendant in execution; possession. The holder of the legal title at the time of issuance of execution or order of sale shall have the same right of redemption upon the same terms and conditions as the defendant in execution, and also shall be en-

titled to the possession of the property the same as the defendant in execution, as hereinbefore provided.

60-3457. Deed at end of redemption period; to whom executed; liens and debts of deceased. If the defendant in execution or order of sale, or his assigns, or the owner of said legal title, fail to redeem, the sheriff must, at the end of the redemption period herein provided, execute a deed to the person who is entitled to the certificate of purchase as hereinbefore provided, or his assignee. If the person entitled to a deed be dead, the deed shall be made: (*a*) If such person died intestate, to the persons entitled thereto under the laws of descent and distribution; and (*b*) if such person died testate, to the person, association, or corporation entitled thereto under the will of the deceased owner; but the property will be subject to all liens or to the payment of the debts of the deceased in the same manner as if acquired during his lifetime.

60-3458. Record of evidence of purchase of real estate to be made, when. The purchaser of real estate at sale on execution or order of sale or special execution must place evidence of his purchase upon record within six months after the expiration of full time of redemption; up to that time the publicity of the proceedings is constructive notice of the rights of the purchaser, but no longer.

60-3459. Injury or waste after sale; recovery of damages. The purchaser or party entitled to a deed under sale, as hereinbefore provided, may, after the deed is made to him by the sheriff, recover damages for any injury or waste permitted upon the property purchased after the sale and before possession is delivered under the conveyance.

60-3460. Real estate once sold; second sale not permitted, when. Real estate once sold upon order

of sale, special execution or general execution shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for.

60-3461. Injunction or receiver to protect property; rights of parties. The holder of the certificate of purchase shall be entitled to prevent any waste or destruction of the premises purchased, and for that purpose the court, on proper showing, may issue an injunction; or, when required to protect said premises against waste, appoint and place in charge thereof a receiver, who shall hold said premises until such time as the purchaser is entitled to a deed, and shall be entitled to rent, control and manage the same; but the income during said time, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of its legal title.

60-3462. Application of redemption act. The provisions of this act shall apply to all sales under foreclosure of mortgage, trust deed, mechanics' lien, or other lien, whether special or general, and the terms of redemption shall be the same.

60-3463. Sheriff's return of sale; confirmation of sale by court; sheriff's certificate of purchase. The sheriff shall at once make a return of all sales made under this act to the court; and the court, if it finds the proceedings regular and in conformity with law and equity, shall confirm the same, and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in this act.

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No. 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEES

EMMET A. BLAES,
HARRY L. HOBSON,
500 Farmers & Bankers Life Bldg.,
Wichita, Kansas,
Attorneys for Appellees.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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No. 18

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BRIEF OF APPELLEES

OPINIONS BELOW

No opinion was rendered by the District Court of Edwards County, Kansas. The opinion of the Supreme Court of Kansas (R. 39-55) is reported at 185 Kan. 274, 341 P.2d 1002.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered on July 10, 1959 (R. 39). The notice of appeal to this Court was filed on October 6, 1959 (R. 61) and probable jurisdiction was noted on February 23, 1960 (R. 62). Appellant asserts that the jurisdiction of this Court is founded on 28 U.S.C. 1257 (2) in that the case involves the judgment of the highest court of a state in a case where the validity of a state statute was drawn in question as being repugnant to a law of the United States and the decision was in favor of its validity. Appellees concede that the United States argued before the Supreme Court of the State of Kansas that there existed a conflict between a federal and a state statute and appellees further concede that the Supreme Court of Kansas decided in favor of the validity of the state statute.

STATUTES INVOLVED

The pertinent statutes are set forth in the appendix to the Brief of the United States at pp. 33-42.

QUESTION PRESENTED

Whether 28 U.S.C. 2410(c) grants the United States, as the second mortgagee of real estate judicially foreclosed and sold in a suit in which the United States was afforded all the relief it sought but failed to protect its interest by bidding at the foreclosure sale, the right to redeem within one year from the date of sale when by state statute the mortgagor has the exclusive right to redeem during that period.

STATEMENT

The statement of the case set forth in the Brief of the United States (pp. 2-7) sufficiently states the factual background of this matter. However, the Court should not be left with the impression that the affirmative relief sought by the United States on three promissory notes here involved had any relationship to the initial action brought by the John Hancock Mutual Life Insurance Company for foreclosure of its mortgage. The United States held no security for the three notes and though it prayed that the total amount of its claim be adjudged a lien on the real property involved, the court failed to so decree (R. 23).

SUMMARY OF ARGUMENT

The United States was summoned into court pursuant to 28 U.S.C. 2410 by the John Hancock Mutual Life Insurance Company. If a condition on the appearance of the United States in the foreclosure action was acknowledgment of a one year period of redemption for the United States following the foreclosure sale, such condition was waived when the United States stepped from its role as a party-defendant and sought affirmative relief against a codefendant. The United States, when seeking affirmative relief in a state court, is subjected to the same rules and procedures as any private litigant. Among the rules to which the Government acquiesced by its prayer for relief in the Kansas courts is that statutory provision which gives the defendant-mortgagor the exclusive right to redeem for the first twelve months following a foreclosure sale.

The foreclosure sale was held, in accordance with the decree of the District Court of Edwards County, Kansas, to satisfy the liens of both the first mortgagor and the United States. The one year redemption period granted the United States in 28 U.S.C. 2410(c) applies, if at all, when a sale is held solely to "satisfy a lien prior to that of the United States." Since the proceeds of the sale in this case were to be paid first to the first mortgagor and then, in accordance with its prayer, to the United States, the sale was held to satisfy not only a prior lien but the lien of the United States as well, and the redemption provision has no application.

The statute, 28 U.S.C. 2410(c), provides that a judicial foreclosure sale shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as is provided with respect to such matters by local law. Local law in Kansas requires the lienholder to appear and bid at the sale to assure protection of a junior lien. Though the United States was authorized both by its mortgage instrument and 7 U.S.C. 1025 to bid at the sale it failed to do so. Therefore, the effect of the sale by local law was to discharge the property from all junior encumbrances, including the lien of the United States. The subsequent redemption by the mortgagors, during the period of their exclusive right to redeem, made the discharge complete and the United States is now without an interest in the real property.

Property rights and interests in property are matters to be determined exclusively by state law. The Congress is without authority to interfere with property relationships within the boundaries of a sovereign state. The laws of Kansas, both statutory and decisional, determine property relationships in that state. When the first mortgage attached to the property here involved certain rights ac-

crued to the mortgagee by Kansas law. Among those rights was the exclusive right to redeem during the first twelve months following a foreclosure sale. Such right cannot be waived by the mortgagee. The Congress is without authority to take this right from a Kansas landowner and consequently the decision of the Supreme Court of Kansas should be affirmed.

ARGUMENT

I.

The United States, by Seeking Affirmative Relief in the Courts of Kansas, Subjected Itself to the Rules and Procedures of Kansas Law and Waived Any Conditions Imposed on Its Appearance Pursuant to 28 U.S.C. 2410.

The thrust of the argument of the United States is premised on the proposition that the third sentence of 28 U.S.C. 2410(c), the one year right to redeem, imposes a condition upon the waiver of sovereign immunity by the United States. The Government has argued what, of course, is conceded, that the United States cannot be sued without its consent. It is further conceded that service of process in this action was accomplished on the Government in accordance with the procedures provided in 28 U.S.C. 2410(c). It is likewise conceded that under Kansas law the United States was a necessary party to the foreclosure suit if its lien was to be extinguished. *Motor Equipment Co. v. Winters*, 146 Kan. 127, 69 P.2d 23.

Even if it were conceded, and it is not, that the one year right of redemption is a "protective condition" on the appearance of the United States in a foreclosure suit, the character of the appearance of the Government in the lawsuit in the District Court of Edwards County, Kansas,

changed when the United States, having waived its immunity, chose to file a cross petition seeking affirmative relief against a codefendant rather than simply filing an answer. When the United States appeared in the Kansas court it did so not so much as a defendant junior lienor hailed into court pursuant to 28 U.S.C. 2410, but as a party plaintiff seeking relief against the defendant mortgagors. It should be borne in mind that it was not the defendant mortgagors, the appellees here, who summoned the United States into the law suit. It was not the defendant mortgagors for whom the Government waived its immunity. It was the defendant mortgagors, however, against whom relief was sought by the United States. The relationship then became one in the nature of plaintiff-defendant when the cross petition was filed, with the United States as plaintiff and the mortgagors as defendants. A delineation was even made in the pleading filed by the Government between its answer and cross petition, the cross petition relating solely to relief against the defendant mortgagors (R. 11-13). It is for this reason that the appellees argue that the character of the appearance of the Government changed when the cross petition was filed and any condition on its appearance in the state court action was waived.

Though the United States did hold one note from the defendant mortgagors secured by a second mortgage on the property foreclosed in the state action (R. 22), it held three additional notes for which it had no security. The United States was not satisfied to seek a foreclosure of its second mortgage, per its authority in 28 U.S.C. 2410(c), but rather sought, like a party plaintiff, the assistance of the courts of the State of Kansas to secure judgment against the defendant mortgagors on the three additional notes (R. 13). When it sought those judgments it was

seeking affirmative relief and it thereby subjected itself to the rules and procedures imposed by the statutes and the courts of the State of Kansas. This Court has often said that the sovereign is no different from any other party when it seeks relief in foreign courts.

> "By voluntarily appearing in the role of suitor it [the sovereign] abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134.

See also *United States v. Martin*, 267 F.2d 764 (10th Cir.). And "Where a sovereign voluntarily litigates, he must play the role of a litigant like any other suitor and abide by the consequences." *United States v. National City Bank*, 83 F.2d 236, 238 (2d Cir.); cf. *United States v. Maryland Cas. Co.*, 235 F.2d 50, 53 (5th Cir.).

In *United States v. The Thekla*, 266 U.S. 328, this Court made reference to the role of the United States in a suit in which it sought affirmative relief. The Court said:

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it.
>
> * * *
>
> "* * * it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States * * *. It joined in the suit, and that carried with it the acceptance of what-

ever liability the courts may decide to be reasonably incident to that act." *Id.* at 339-41.

Though *The Thekla* was a suit in admiralty and consequently distinguishable, the quoted language was repeated in a non-admiralty suit by this Court in *American Propeller & Manufacturing Co.* v. *United States*, 300 U.S. 475. There, in an action against the United States, the Government counterclaimed for an amount in excess of the petitioner's claim. Again the Court placed the United States in the position of a private suitor to the end that justice could be done.

The United States voluntarily chose the forum in which to seek judgment on its three notes. It could have sued elsewhere or refrained from suing. Since it chose neither of these alternatives, it consented that the Kansas court should determine all matters in issue in accordance with the rules of law applicable to like controversies arising between private litigants. *United States* v. *Moscow-Idaho Seed Co.*, 92 F.2d 170 (9th Cir.). See also, *Mountain Copper Co.* v. *United States*, 142 Fed. 625 (9th Cir.), where the court said:

> "It is the well-established law that, when the government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less." *Id.* at 629.

The legislative and decisional trend is toward relaxation of governmental immunity. See, *e. g.*, *National City Bank* v. *Republic of China*, 348 U.S. 356; *United States* v. *Yellow Cab Co.*, 340 U.S. 543. This being true, and the Government having provided a basis for the relaxation of the rule in this case by assuming the role of a party plaintiff, the Kansas Supreme Court determination should be affirmed. The Government should be required to ac-

cept its role as a party plaintiff and the attendant consequences the same as any other litigant.

II.

Where a Foreclosure Sale Is Held to Satisfy Not Only a Prior Lien but the Lien of the United States As Well, It Is Reasonable to Argue That the Redemption Provision of 28 U.S.C. 2410(c) Has No Application.

There is some question whether the redemption provision in the third sentence of subsection (c) of 28 U.S.C. 2410 has any application under the circumstances here. The provision applies solely "where a sale is made to satisfy a lien prior to that of the United States." If, then, the sale was made to satisfy other liens the redemption provision perhaps has no application. Pursuant to the prayer in the cross petition by the United States (R. 13), the sale of the real estate was made not only to satisfy a prior lien but to satisfy the lien of the United States as well (R. 24). It was the order of the District Court of Edwards County, Kansas, that the real estate be sold and the proceeds be applied as follows:

> "First: to the payment of the costs of this action, and of said sale;
>
> Second: to the payment of all taxes which are a lien and payable on said premises at the time of said sale;
>
> Third: to the payment of the first lien in favor of the plaintiff, John Hancock Mutual Life Insurance Company, a corporation;
>
> Fourth: to the payment of the second lien in favor of the defendant, The United States of America, and costs;

Fifth: the balance, if any, to be paid to the person or persons entitled thereto under the direction of the court; together with accumulated interest on the liens to date of sale; * * *" (R. 24).

The sale was not held solely for the benefit of the John Hancock Mutual Life Insurance Company, the plaintiff and holder of the first mortgage, but was also held for the benefit of the United States. Thus, if the redemption provision applies *only* where a sale is conducted to satisfy a prior lien, it has no application here.

The direction for the payment of the proceeds from the sale by the District Court was in accordance with the whole statutory scheme of mortgage foreclosures in Kansas and was premised on the necessity of an appearance at the sale rather than dependence on a right of redemption by any party wishing to protect its lien. See *Moore* v. *McPherson*, 106 Kan. 268, 187 Pac. 884. The Government says the fact that the sale was made for the purpose of satisfying the federal lien as well as the first mortgage is "immaterial." (Brief for U.S. in Opposition to Motion to Dismiss or Affirm, p. 6, n. 9). That fact is not immaterial in light of the Kansas statute permitting but one sale to satisfy the lien. See *Frazier* v. *Ford*, 138 Kan. 661, 27 P.2d 267. See also the journal entry of judgment of the District Court of Edwards County, Kansas (R. 25). The Government argues that the fact that the insurance company bought the property at the foreclosure sale at a price sufficient only to satisfy its own lien indicates that the sale was made to satisfy only the lien of the insurance company. The reason the property sold for an amount insufficient to satisfy the government's lien is the fact that the Government failed to appear, as required by the laws of the State of Kansas, at the sale to bid in the property if it wished to protect whatever

interest it might have in the property. *Moore* v. *McPherson,* 106 Kan. 268, 187 Pac. 884; *Sigler* v. *Phares,* 105 Kan. 116, 181 Pac. 688. It is perhaps unfortunate that some magnanimous soul did not appear at the sale and bid an amount sufficient to pay off all lienholders but in the absence of such a person at the sale the lienholder himself must bid if he wishes protection.

It should be noted that the sworn affidavit supporting the "motion for certificate of redemption" filed by the State Director of the Farmers' Home Administration for Kansas includes the erroneous statement that the judgments awarded the Farmers' Home Administration were "adjudged to be second liens on the real estate which was the subject of said action" (R. 28). The only judgment decreed to be a lien was the judgment on the note secured by the mortgage on the real estate here in controversy (R. 23).

It should further be noted that the United States did not actually seek a foreclosure of its lien but rather prayed only that "in the event the Court shall enter an order providing for the judicial sale of the * * * real estate" the balance of the proceeds after payment to the first lienholder be paid to it. Such careless pleading could have resulted in a waiver of the lien held by the United States. The lien of a junior mortgagee is waived in Kansas by failure to have the lien foreclosed in a foreclosure proceeding instituted by the first mortgagee. *Federal Land Bank* v. *Shoemaker,* 155 Kan. 501, 126 P.2d 205; *Moore* v. *McPherson,* 106 Kan. 268, 187 Pac. 884.

Since the foreclosure sale was held to satisfy the lien of the United States as well as the first lien and since the Kansas court could have declared the lien of the United States waived, the United States has no redemption privi-

lege under 28 U.S.C. 2410(c) and the decision of the Supreme Court of Kansas should be affirmed.

III.

The Effects of a Judicial Sale Are Determined by Local Law and Since, by the Laws of Kansas, the Lien of a Junior Lienholder Can Be Fully Protected Only by Bidding at the Sale, the United States Has Lost Its Lien by Its Failure to Appear and Bid and Its Alleged Right of Redemption Is Ineffective to Protect Its Property Interest.

The first sentence of subsection (c) of 28 U.S.C. 2410 provides that:

> "A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated."

When that section is read literally and alone, a summary affirmance of the decision of the Kansas Supreme Court is required. It is only when it is read in conjunction with the third sentence of the subsection that any doubt as to its meaning is cast. That doubt is erased by consideration of the legislative history of the entire section as will be demonstrated, *ilnfra*, pp. 14-17.

There is no question that by the "local law" of Kansas (which includes both statutory and decisional law, *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64) the property in question has been discharged from the encumbrance held by the United States by the judicial sale of that property and the subsequent redemption by the mortgagor. As has been held so many times by the Supreme Court of

the State of Kansas, it was incumbent upon the United States to appear at the sale and bid for the protection of its lien. See, e. g., *McFall* v. *Ford*, 133 Kan. 593, 1 P.2d 273, in which the court said:

> "The law gave her a lien. She was bound to know her lien was an inferior lien, subject to discharge by a sale under the superior lien, and she was required to be diligent in watching the proceedings to enforce the superior lien if she desired to protect her own * * *. She had the right to bid at the sale, and so protect her lien. She had the right to participate in distribution of surplus on application if the land sold for more than the first lien. She had the right to redeem, subject to the landowner's preemptive right." *Id.* at 608, 1 P.2d at 280.

See also *Frazier* v. *Ford*, 138 Kan. 661, 27 P.2d 267.

If a judicial sale, then, is to have the "same effect respecting the discharge of property from liens and encumbrances held by the United States", as is provided by "local law," the lien of the United States on Kansas property has been discharged by its failure to bid at the sale and the redemption by the mortgagor. Cf. *Custer* v. *McCutcheon*, 283 U.S. 514.

The United States could have purchased at the foreclosure sale to protect its interest in accordance with the terms of the mortgage itself (R. 38). Furthermore, there is specific authorization for bid and purchase by the United States at a foreclosure sale under the circumstances of this case. 7 U.S.C. 1025 provides that:

> "The Secretary [of Agriculture] is authorized and empowered to make advances to preserve and protect the security for, or the lien or priority of the lien securing, any loan or other indebtedness owing to, insured by or acquired by the Secretary under any

> programs administered by the Farmers' Home Administration; *to bid for and purchase at any foreclosure or other sale* or otherwise acquire property pledged, mortgaged, conveyed, attached or levied upon to secure the payment of any such indebtedness * * *." (Emphasis added).

This statute, in this form, became effective August 1, 1956, so that it was in effect at the time of the foreclosure sale in Edwards County, Kansas. The loan and mortgage were under a program "administered by the Farmers' Home Administration" and consequently the statute has application here. Thus, the United States had within its power a means to assure the protection of its interest in the land. It could have complied with state law and avoided the legal problem it here attempts to establish if it had wished to do so. The Government has admitted that federal law should take precedence over state law, if at all, only to the extent necessary for the effectuation of federally-created rights. (Brief of Appellant, p. 30). The federally-created right to protect the interest of the United States in the property could be effectuated here without a declaration of invalidity of any state procedure. There was nothing to prohibit the Government from applying its federally-created right to bid at the sale and protect its interest. No hardship is worked on the Government by application of the state procedure.

The legislative history of Section 2410(c) of Title 28 of the United States Code does not aid the appellant in its argument. It is obvious, both from the portions of the legislative history cited by the appellant and from the remainder of the history as found in the Congressional Record and the Committee Reports that the purpose of the statute was to enable private lienors to join the United States as a party to clear the record on encumbered real

estate. In addition to the comments from the legislative history quoted by the United States in its brief the following statement made on the floor of the House on *H.R. 980, 71st Cong.*, 2d Sess., is significant. Mr. Graham:

> "* * * this bill was reported not for the purpose of subordinating any liens of the Government to any other lien but because real estate is fettered now throughout the country in such a way that there is a clamor for relief.
>
> "Every building association and every title and trust company that passes on titles is calling for an amendment that will enable the owner of a piece of real estate to unfetter it from the lien which the Government might have on it, and it applies only to those cases where there is a lien on the property acquired before the Government's lien attached. It only provides a method by which the Government can be made a party and that lien disposed of by a judicial sale, in the same manner in which liens are disposed of in every State, and ought to be in every Federal court throughout the land." 72 *Cong. Rec.* 1998.

Though these remarks pertained to H.R. 980 in an earlier form than that in which it was finally passed, they nevertheless indicate the general purpose for which the legislation was enacted and give a clue as to what Congress specifically intended. The statute was designed to eliminate the "unfair disadvantage" to which private lienors had been subjected "because of inability to join effectively the Government as a party to judicial proceedings." *United States v. Brosnan*, 363 U.S. at 248. And the effect to be given a judicial sale in accordance with the expression of intent was to dispose of liens in the same manner in which liens are disposed of by state law.

The reference to a right of redemption was made in the statute because the United States had no authority to

purchase at a foreclosure sale at the time the statute was written and it therefore had no other means of protection. 74 *Cong. Rec.* 6208. There had earlier been a provision in the statute for delaying the sale until the end of the session of Congress following the foreclosure judgment, thus permitting the Government to obtain a Congressional appropriation to bid at the sale. See *S. Rept. No. 351, 71st Cong., 2d Sess.*, pp. 1-2; 72 *Cong. Rec.* 7020. This provision was stricken in favor of the redemption right in order that the United States would have a means of protecting itself in those states where a redemption right did not otherwise exist. There is nothing in the legislative history to indicate any other intention, What comfort the United States finds for its position in the following excerpt from the Conference Committee Report in *H. Rept. No. 2722, 71st Cong., 3d Sess.*, p. 4, remains a mystery to appellees:

> "In many States of the Union there are now laws allowing junior lien holders as well as fee owners a year in which to redeem from execution and foreclosure sale of real estate. It is true that in other States no such equity of redemption exists. However, the provision adds nothing to the present difficulties in States which allow no redemption period, as under present conditions where present lien holders can not sue the United States, the rights of the United States never are barred by foreclosure decree."

If this statement is of any help at all, it seems to appellees to demonstrate that Congress was concerned with those states where no redemption period was allowed junior leinholders. It was the purpose of Congress, then, to provide a redemption right in those states. There is no indication of an intent to grant the United States a lesser right than that provided by state law. In Kansas the United States had not twelve months but fifteen months

in which to redeem subject of course to the preemptive right of the landowner mortgagor. *G.S. Kan. 1949,* 60-3440. Moreover, as already noted, both by statute and by the terms of the mortgage itself, the Government could have bid in the property at the foreclosure sale and protected its interest in that manner. There is no evidence that any conflict with existing state statutes was anticipated or that there was any intention to supersede an existing right created by state statute in a mortgagor.

The argument of the United States that the one year redemption period is a condition imposed on the waiver of sovereign immunity for the "protection" of the United States loses much of its force when the Government refuses to argue that this one year period is exclusive with the Government. And, *a fortiori* when the Government *emphasizes* its refusal to so argue (Appellant's Brief, p. 12). In fact, the Government argues that its right is "coexistent" with that of the landowner-mortgagor (Appellant's Brief, p. 30). If that be so, and if the landowner-mortgagor redeems first, then the United States loses, by its inaction, its lien and all of its interest in the property. *Sigler* v. *Phares,* 105 Kan. 116, 181 Pac. 688. The United States admits as much when it says "redemption by the mortgagor cuts off the redemption rights of junior lienholders." (Appellant's Brief, p. 13). The "protection" the United States claims Congress intended by enacting the "proviso" is not afforded by that "proviso" if the Government maintains its "coexistent" rights position.

It seems far more reasonable to read the legislative history for what it says—the purpose of 28 U.S.C. 2410 was to enable lienors to clear title to property encumbered by junior government liens. General recognition of the validity and effect of state laws was given. The United States was granted a year in which to redeem when

such redemption right or superior protection by state law was not otherwise afforded.

The United States is experiencing some difficulty with another of the "conditions" it says is imposed on the waiver of sovereign immunity in 28 U.S.C. 2410 as a "protection" for the United States. Though on the surface it appears that the United States has an absolute right to remove a case brought in state court pursuant to 28 U.S.C. 2410 to federal court and have it heard there, that "right" or "condition" has lost its effectiveness to grant "protection" to the United States by the determination that the federal court has no jurisdiction on removed foreclosure or quiet title cases unless there is a separate basis for original jurisdiction in the federal court. *Wells* v. *Long*, 162 F.2d 842 (9th Cir.); *Jones* v. *United States*, 179 F. Supp. 456 (S.D. Calif.); *George* v. *United States*, 181 F. Supp. 522 (S.D. Tex.). Thus the "condition" that immunity to suit is waived only if the United States can remove the case to federal court is ineffective as a "protection" for the United States. "Conditions" then are not absolute. Private litigants have been permitted to proceed against the United States in state courts and the federal courts have not accepted the government's argument that if it cannot remove the cases to federal court it has not waived its immunity to suit. See the discussion in *George* v. *United States*, 181 F. Supp. 522 (S.D. Tex.). Therefore this Court should not accept the argument of the Government here that if the one year redemption right is not granted there has been no waiver of immunity and the foreclosure sale has been ineffectual to discharge the government encumbrance.

Local law determines the effects of the foreclosure sale. Local law applied here relieves the United States of its lien by its failure to bid at the sale.

IV.

The Laws of the State Are Supreme in Matters of Property Rights and Interests and Therefore the Kansas Redemption Statute Governs the Parties Here.

The law of the State in matters defining and establishing property interests and rights in property is supreme. *United States* v. *Bess*, 357 U.S. 51; *Central Surety and Ins. Corp.* v. *Martin Infante Co.*, 272 F.2d 231 (3d Cir.); *Matter of City of New York*, 5 N.Y.2d 300, 157 N.E.2d 587. If 28 U.S.C. 2410(c) was intended to have the implications the Government contends, then it was enacted beyond the bounds of Congressional authority. There is no constitutional authority for interference by Congress in property relationships within a state. This Court, in the landmark case of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78, said:

> "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."

and the Court continued:

> "'the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.'" *Id.* at 79.

Though the Court was there deciding what law should be applied by a federal court in a diversity action on a common law question, the Court nevertheless recognized that in matters of common law the state law is supreme. State statutory rules governing property rights have been held supreme. See *In re Karlinski's Estate*, 180 Misc. 44, 43 N.Y.S.2d 40; and Congress cannot exert control over individual property rights except in the proper exercise of

its constitutional powers. *Ginsberg* v. *Lindel*, 107 F.2d 721 (8th Cir.). This Court long ago held that matters of property law are left for state definition. In *United States* v. *Fox*, 94 U.S. 315, the Court ruled that:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer * * * is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated * * *. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State." *Id.* at 320-21.

Kansas, too, is a sovereign and is entitled, by virtue of never having relinquished the power, to define and regulate real property relationships within her bounds.

The terse statement in *Morgan* v. *Commissioner*, 309 U.S. 78, 80, that "State law creates legal interests and rights," is significant. More recently, in the language of Mr. Justice Harlan, in *United States* v. *Brosnan*, 363 U.S. 237, the Court said:

> "However, when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures * * *. We think it more harmonious with the tenets of our federal system and more consistent

with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule." *Id.* at 241-42.

The United States recognizes that it is "appropriate to look to state law" for the rules governing redemption except for the period of time when the redemption right can be exercised (Brief of Appellant, p. 31). Appellees urge that it not only is appropriate to look to state law but it is required, and we must look to *all* of the state laws governing property matters, not just some of them. Federal agencies holding second mortgages on Kansas real estate have been subjected to the Kansas redemption statutes many times in years past and, to our knowledge, without objection. In fact, counsel for the federal agencies have recognized the exclusive right of the mortgagor to redeem during the first twelve months after a judicial sale. See, *e. g.*, the motion for rehearing filed by the appellant, the Federal Farm Mortgage Corporation, in *Federal Land Bank* v. *Shoemaker*, 155 Kan. 501, 126 P.2d 205, where counsel for the government agency said that appellant was seeking the right of redemption given it by Kansas statute "which right of redemption would, of course, be subject to the owner's exclusive right during the first twelve months of the redemption period." (Motion for Rehearing, Case No. 35554 in the Supreme Court of the State of Kansas, p. 4, now retained in the Kansas State Library, Topeka, Kansas.) In that case the Federal Farm Mortgage Corporation, a second mortgagee, was joined as a defendant, cross-petitioned, and asked for a finding that it was entitled to a right of redemption. It was recognized, however, that the mortgagor had the exclusive right to

redeem for the first twelve months after the sale. To the same effect see *Federal Land Bank* v. *Ludwig*, 157 Kan. 657, 143 P.2d 784, in which, again, the Federal Farm Mortgage Corporation held a second mortgage on Kansas real estate, was joined as a defendant, cross-petitioned for foreclosure of its mortgage, and more than twelve months after the judicial sale sought to redeem. Counsel for the federal agency there recognized the validity of the Kansas statutes:

> "* * * the statute gives the defendant landowner an exclusive right to redeem the property at any time during the first twelve months following the sale by paying only the amount bid at the sale, with interest." (Abstract and Brief of Appellant in Case No. 35983 in the Supreme Court of the State of Kansas, p. 57, retained at the Kansas State Library, Topeka, Kansas.)

The applicability of Kansas statutes in matters of redemption has not heretofore been questioned.

A lien of the United States attaches only to such interest or right in property as the debtor holds at the time of the attachment of that lien. The interest or right in property of the debtor is defined by state law. *United States* v. *Bess*, 357 U.S. 51; *Commissioner* v. *Stern*, 357 U.S. 39; *Matter of City of New York*, 5 N.Y.2d 300, 157 N.E.2d 587; *Aetna Casualty and Surety Co.* v. *United States*, 4 N.Y.2d 639, 152 N.E.2d 225. The question here, then, is what interest the appellees had in the fee to which the mortgage lien attached in accordance with Kansas law.

This Court has recently again "rejected the contention that because a fee owned by a taxpayer was already encumbered by a lien which enjoyed seniority under state law, the Government's lien necessarily attached subject

to that lien." *United States* v. *Brosnan*, 363 U.S. at 241. We do not therefore argue that solely because of the prior *existence* of the first mortgage the government lien was subject to that mortgage. However, the factual background of this case clearly demonstrates that the government's lien attached subordinate to the encumbrance already on the property. It is not necessary to go to state law to reach that conclusion. The mortgage instrument itself provides that the government lien is subject to the mortgage of the John Hancock Mutual Life Insurance Co. Here then the question is what property interest the landowner retained to which the lien of the United States could attach under Kansas law.

The effects of the first mortgage and its foreclosure on junior encumbrances are matters to be determined by state law. See 28 U.S.C. 2410(c); cf. *United States* v. *Bess*, 357 U.S. 51. When the first mortgage attached, the landowner was left with certain rights and privileges pertaining to the land under state law. One of those rights was that in the event of a foreclosure sale on the first mortgage he would have eighteen months in which to redeem and during the first twelve of those months his right would be exclusive. *G.S. Kan., 1949,* 60-3439-40. The defendant mortgagor is precluded by statute in Kansas from waiving his right of redemption even if he chooses to do so. *G.S. Kan., 1949,* 60-3438. Therefore, when the United States took appellees' note and mortgage as security the exclusive redemption right had already attached to the mortgagors subject only to a foreclosure sale by the first mortgagee. There were, then, no redemption rights left to attach to the property after sale for the first twelve months for the United States. The language, "subject to mortgage in the amount of $25,000.00 in favor of The John Hancock Company" in the mortgage

instrument (R. 36) subjected the government's lien to the effects of that first mortgage as well as to the mortgage instrument itself. Since by the execution of the first mortgage to the insurance company, certain rights attached to the mortgagor and mortgagee, and since the right of redemption attaching to the mortgagor could not by legislative fiat of the State of Kansas be waived by him under any circumstances, the alleged right of the United States to redeem during the first twelve month period did not and could not attach as an effect of the foreclosure sale.

Perhaps in states having redemption statutes different from those of Kansas or in states where redemption rights do not exist at all, the right of the Government to redeem within one year from the foreclosure sale could have attached at the time the lien attached. But Kansas has given its landowners perhaps an unusual degree of protection. This the United States knew when it loaned money to Mr. and Mrs. Hetzel. See 39 Stat. 382, 12 U.S.C. 971. To these things the Government subjected itself when it loaned money with that knowledge and with the acknowledgment of the first mortgage.

The *Brosnan* case, decided in June, warrants additional consideration. The Court, analyzing the legislative history of 28 U.S.C. 2410(c), concluded that its purpose was to aid private lienors in removing encumbrances on property held by the United States. Certain protections were afforded the United States in the event suit was commenced pursuant to the waiver of sovereign immunity by the United States. Though Mr. Justice Harlan in writing for the Court stated that the Government is "guaranteed" a one year right to redeem if the plaintiff proceeds under section 2410, such language was not necessary to the holding in the case and must be considered *dicta*.

It was not the question at issue. Nevertheless, Kansas law "guarantees" a fifteen month period for redemption by the Government rather than just a twelve month period. The Government is therefore afforded the protection this Court has indicated Congress had in mind in enacting the statute. In reviewing all of the legislative history the Court said:

> "In any event, the basic question is not what the existing state of the law was, or even what Congress believed it to be, but whether Congress intended to exclude the application of all state procedures, whatever their existence or effectiveness might be. No such inference can be drawn from the legislative statements referred to." 363 U.S. at 250.

One cannot infer from the history that Congress intended that if "protection" otherwise existed application of the federal statute was to invalidate long existing state procedures. Certainly, if the Government can be divested of a lien pursuant to a state procedure which does not even require notice of sale to the Government, *United States* v. *Brosnan, supra,* it could be divested of an interest in land when, though it has notice, it fails to take the steps necessary to protect that interest in accordance with state procedures. This is not a case where the Government "will be left without any protection," *United States* v. *Brosnan, supra,* at 261, Clark, J., dissenting. And certainly if divestiture of junior government liens is permitted by a private foreclosure sale pursuant to terms of a mortgage unknown to the Government, *United States v. Cless,* 254 F.2d 590 (3d Cir.), a judicial sale pursuant to state law giving the United States more "protection" than 28 U.S.C. 2410(c) provides, should certainly divest the United States of its lien.

Language from the *Cless* case relied upon heavily by the Supreme Court of Kansas in this case is persuasive. The Third Circuit said:

> "We find nothing in the statute [28 U.S.C. 2410] giving the United States rights in this matter superior to the rights enjoyed by private citizens. The statute accords to the government no such preference.
>
> * * *
>
> "In the absence of express Congressional action to the contrary, we think it is not asking too much from a federal agency, which has embarked upon the business of lending money in competition with private firms and individuals, simply to be governed by the same local law which controls the rights of private citizens in a similar endeavor. And the government could not have been taken by surprise by local law established for one hundred years or more. In this situation, notice adequate to others is adequate to the United States." *Id.* at 593-94.

Since no intention to give the United States superior rights has been expressed by Congress the validity of Kansas procedures should be recognized.

CONCLUSION

Since the United States waived any condition on its appearance in the Kansas court and since Kansas law should be applied to determine the rights of mortgagees in Kansas real property, the decision of the Supreme Court of Kansas is correct. That judgment should therefore be affirmed, or in the alternative, if after an analysis of the unique factual background the Court should find there is

no substantial question involved, the appeal should be dismissed.

Respectfully submitted,

Emmet A. Blaes,
Harry L. Hobson,
500 Farmers & Bankers Life Bldg.,
Wichita, Kansas,
Attorneys for Appellees.

September, 1960.

No. 18

In the Supreme Court of the United States

October Term, 1960

United States of America, appellant

v.

John Hancock Mutual Life Insurance Co., George Hetzel and Grace Marie Hetzel

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MORTON HOLLANDER,
SHERMAN L. COHN,
Attorneys.
Department of Justice, Washington 25, D.C.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 18

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

REPLY BRIEF FOR THE UNITED STATES

In their brief, appellees present four reasons for this Court to affirm the judgment of the court below:

(1) when the United States "sought * * * judgments"[1] upon its three unsecured promissory notes,

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[1] Appellees' description of the United States as "seeking" judgment on the unsecured note is somewhat imprecise. In its cross-petition, the United States did not specifically pray for judgment upon either the unsecured notes or the secured, but asked that the amounts due on all four notes be determined to be a lien inferior only to that of the Insurance Company, that the proceeds of the sale be applied to the Government's lien after the senior lien had been satisfied, and that the court grant "all other relief in the premises" (R. 13). The trial court, following Kansas law, Kan. Gen. Stat., 1949, 6[illegible] 3107, granted the United States judgment upon all four notes.

it "was seeking affirmative relief and it thereby subjected itself to the rules and procedures imposed by the statutes and the courts of the State of Kansas" (Brief, pp. 6–7) and thus waived its sovereign immunity; therefore it was unnecessary to look to 28 U.S.C. 2410(a) and its attendant conditions;

(2) the redemption provision of Section 2410(c) was meant to apply to situations in which a foreclosure sale is held "only" (Brief, p. 10) to satisfy a lien prior to that of the United States and not to a situation where the proceeds of the sale, if in excess of the claims of the senior lienor, would be applied under Kansas law to the junior lien claim of the United States;

(3) Congress intended that, when the redemption provisions of state law conflict with the right of redemption accorded the United States in Section 2410(c), the state law shall control; and

(4) if the redemption provision of Section 2410(c) was meant to control, although in conflict with state law, Section 2410(c) would be invalid, for such provision is "beyond the bounds of Congressional authority" (Brief, p. 19).

These arguments are without merit. As three of these four contentions of appellees were not raised by them in the court below (the third argument dealing with congressional intent is the sole exception), a reply is necessary.

At the outset it should be noted that appellees concede that under Kansas law the United States as the holder of a junior lien was an essential party to the

suit of the appellee Insurance Company to foreclose its senior lien if the Government's junior lien was to be extinguished. It is also conceded that, in the foreclosure proceeding instituted by appellee as the holder of the first mortgage, service of process was made upon the United States in accordance with the procedure provided in 28 U.S.C 2410(c) (Appellees' brief, p. 5). It is our position that, since the plaintiff utilized Section 2410 to subject the United States to process and this was the only method by which such process could be accomplished, the Government was guaranteed a one-year right to redeem. As this Court said in *United States* v. *Brosnan*, 363 U.S. 237, 246, "the Government is guaranteed a one-year right to redeem if the plaintiff proceeds under Section 2410 * * *."

1. The first and second arguments advanced by appellees may be considered together. They ignore the explicit provision of Section 2410(c) that, "[i]n any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien * * *." This provision leaves no doubt that Congress contemplated that the United States could seek the application of funds derived from a foreclosure sale to its own junior lien after the satisfaction of all senior liens. Thus the fact that the United States obtained judgment upon its three unsecured notes [2] or that Kansas law provides that the excess proceeds derived from a foreclosure sale might benefit a junior lienor—in this case

[2] See note 1, p. 1, *supra*.

the United States—is immaterial. Although the United States might subject itself to Kansas law by seeking a state remedy with respect to its unpaid notes, the Government's right of redemption in this case derives from the fact that appellee Insurance Company had invoked Section 2410 in order to wipe out the Government's lien.

The efforts of the United States in the foreclosure proceeding, initiated by appellee Insurance Company, to seek a determination by the court of the validity of its junior lien, the amount of the indebtedness due, and an order providing that, after the payment of costs and expenses on the Insurance Company's lien, the proceeds of the sale be next applied to the lien of the United States (R. 13), were all defensive measures occasioned by the fact that the United States had been subjected to the jurisdiction of the court under Section 2410. This was not a case where the United States had voluntarily sought the aid of the Kansas court, thereby waiving its sovereign immunity from suit, and thereafter the Insurance Company had attempted to enforce the lien of its first mortgage. In that hypothetical situation there would have been no need for the Insurance Company to have utilized Section 2410 in order to subject the United States to process.

Here, the appellee Insurance Company explicitly invoked Section 2410 in order to subject the United States to process and to extinguish the junior lien of the United States; the later efforts of the Government to protect its property interest in accordance with

Kansas law were compelled by the exigencies of its subordinated position. If the initial contentions of the appellees were accepted, it would require this Court, in effect, to write into the unqualified redemption right provided in Section 2410 a qualification that the United States may not seek any affirmative relief. Neither the legislative history nor the plain statutory language shows that such a limitation on the Government's redemption right was intended by Congress.

2. As to the third contention of appellees, we pointed out in our main brief (pp. 22-23) that Section 2410(c) as originally enacted in 1931 (46 Stat. 1528) provided that state law should govern with respect to the discharge of government liens "[e]xcept as herein otherwise provided" and the redemption right was one of the conditions otherwise provided. Unless one is to ignore the expressed intent of Congress to make no change in substance when it deleted the "exception" clause in the 1948 revision of the Judicial Code (see our main brief, pp. 23-24), appellees may not successfully contend that Congress meant by the first sentence of Section 2410(c)[3] that state law may be used to defeat the Government's right of redemption.

"We have often held that where essential interests of the Federal Government are concerned, federal law

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[3] The first sentence of 28 U.S.C. 2410(c) provides that:

A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. * * *

rules unless Congress chooses to make state laws applicable." *United States* v. *93.970 Acres,* 360 U.S. 328, 332–333. In *Brosnan, supra,* the Court said "the basic question is * * * whether Congress intended to exclude the application of all state procedures, whatever their existence or effectiveness might be." 363 U.S. at 250. In enacting Section 2410, Congress did not choose to subject the redemption rights of the United States to state law. By providing for an unqualified, unconditional right of redemption, Congress made it clear that it did not intend the federal right to be dependent upon the refinements of state law, as suggested by appellees.

When Congress intended that the Government should not have the right of redemption conferred by Section 2410(c), it made that intention clear. Section 505 of the Act of April 20, 1950, 64 Stat. 81, as amended, 12 U.S.C. 1701k (pertaining to the National Housing Program), and Section 6, Act of August 19, 1937, 50 Stat. 706, as amended, 12 U.S.C., Supp. I, 640*l*(a)(2) (pertaining to the federal land bank and related agencies), contain unambiguous language that the right of redemption provided in Section 2410(c) shall not apply to the situations described.[4]

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[4] Appellees develop at length (Brief, pp. 21–22) an alleged conflict between the Government's position in certain land bank cases and its position here as to the applicability of the Kansas redemption statute. This "conflict" does not exist because the federal land banks are, *by statute,* not entitled to claim the benefits of Section 2410(c). See 12 U.S.C. 640*l*, cited in the text.

Appellees also suggest that the failure of the Government to assert an exclusive right to redemption during the first year after a foreclosure sale (in contra-distinction to a right co-

Appellees state (Brief, p. 16), however, that Section 2410(c) was intended to give the United States a right of redemption only in those states "where a redemption right did not otherwise exist." But there is nothing in either the legislative history or the broad language of the statute that justifies such a limitation. On the contrary, the Section states unqualifiedly that "[w]here a sale of real estate is made to satisfy a lien prior to that of the United States, the United States *shall* have one year * * * within which to redeem" (emphasis added). This right would be seriously curtailed if, in any case where state law provided a different redemption right for junior lienors, the right of the United States was to be measured by the state rather than by the federal standard. Indeed, although Kansas law permits a junior lienor to redeem only during the 13th through 15th months after sale—at a time when the one-year period provided by federal law has expired—the junior lienor does not even have this right when the mortgagor has redeemed during the first year, as in this case.

3. Appellees' remaining argument is that, if Congress intended the redemption provision of Section

existent with that of the mortgagor) would lead to the possibility of the mortgagor extinguishing the Government's right of redemption in Kansas by beating the Government to the courthouse door. We are not here faced with such a hypothetical situation, since in this case the Government did in fact attempt to redeem prior to the mortgagor's attempt. See our main brief, p. 5. We suggest that the answer in this hypothetical case would be for the Government to have the right to redeem from the mortgagor during the first year upon the payment of the amount specified in Kan. Gen. Stat., 1949, 60-3451. The mortgagor would then have the right to re-redeem from the Government.

2410(c) to control in conflicts with state law, it is an unconstitutional "interference by Congress in property relationships within a state" (Brief, p. 19). Appellees fail to consider, however, that what is involved here is not the law applicable to property relationships *per se* but the power of Congress to establish rules applicable to contracts entered into by the United States.

In this case, the property owners, the Hetzels, executed and delivered a first mortgage to the Insurance Company on May 29, 1951 (R. 19). More than two years later, on October 22, 1953, the Hetzels executed and delivered a second mortgage to the United States, as security for one of their notes (R. 22). Before the execution of the second mortgage, the Hetzels possessed (in addition to an equitable interest) an expectancy that, upon any foreclosure of the first mortgage, they would be able to exercise a Kansas statutory right of redemption, Kan. Gen. Stat. 1949, 60-3439, 60-3440. Not even the appellees suggest that this was a vested right that could not be denied by a change in Kansas law before foreclosure. However, Kansas law happens to provide that this expectancy may not be waived by the mortgagor, Kan. Gen. Stat., 1949, 60-3438, though it may be transferred or assigned, Kan. Gen. Stat., 1949, 60-3455.

As appellees suggest (Brief, p. 24), their constitutional argument is reduced to whether Kansas law, providing that the Hetzels have an *exclusive* right to redeem during the first year after a foreclosure sale, controls the contractual relations of the

United States when Congress has explicitly provided that the United States shall have a right to redeem during that year. They suggest that, if the Government's contract resulted in the Hetzels losing their exclusive right to redeem, there would be a denial of that alleged property right in violation of Kansas law.

The guidelines for the determination of this question have often been laid down by this Court. See, *e.g., United States* v. *Standard Oil Co.*, 332 U.S. 301; *United States* v. *County of Allegheny*, 322 U.S. 174; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, and, most recently, *United States* v. *Brosnan*, 363 U.S. 237. In *Brosnan*, it was contended—as appellees here contend (Brief, p. 19–23)—that under *United States* v. *Bess*, 357 U.S. 51, 55, state law must be looked to for determining the "property and rights to property" in the discharge of liens. This Court rejected that argument, holding upon the authority of *Clearfield Trust, supra*, that the divestiture of junior federal liens was to be determined by federal law, but that "except to the extent that Congress may have entered the field," it was desirable for federal law to follow state law.[5] 363 U.S. at 241. Finally, the Court repeated that "[t]his conclusion would not, of course, withstand a congressional direction to the contrary." 363 U.S. at 242.

In the instant case, we have such a clear direction of the Congress that state law in conflict must bow. For Congress has given the United States an absolute

[5] Although the Court in *Brosnan* dealt with federal tax liens, its reasoning is equally applicable to the liens here involved.

right to redeem within one year, and that federally-created right would be vitiated if it could be defeated by a contrary provision of state law. Appellees have not been able to cite any pertinent authority to the contrary and we know of none.

The cases relied on by appellees (Brief, pp. 19–22) are inapposite. *United States* v. *Fox,* 94 U.S. 315, upon which main reliance seems to be placed, concerned a devise made to the United States of real estate in New York. There was no conflict between state and federal law, but rather a holding that, as devises could not be made at common law and as this devise served no federal purpose as defined by Congress, the New York statute of wills would control. Appellees have omitted from their quotation from the Court's opinion in this case the following significant sentence: "The power of the State in this respect [*i.e.,* as concerns the disposition of immovable property] follows from her sovereignty within her limits, *as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government.*" 94 U.S. at 320. (Emphasis added.)[6]

United States v. *Bess,* 357 U.S. 51; *Central Surety & Ins. Corp.* v. *Martin Infante Co.,* 272 F. 2d 231 (C.A. 3); *Matter of City of New York,* 5 N.Y. 2d 300,

[6] *In re Karlinski's Estate,* 180 Misc. 44, 43 N.Y.S. 2d 40 (Surrogate's Court, Erie County), is to the same effect, holding that, while the Federal Government had no power *per se* to affect state laws of descent, it could enter this field in the exercise of its constitutional power to raise money for the support of military operations.

157 N.E. 2d 587; and *Aetna Cas. & Sur. Co.* v. *United States,* 4 N.Y. 2d 639, 152 N.E. 2d 225, held only that the existence and extent of a property right to which a federal lien might attach was to be determined by state law; once that determination is made, federal law controls as to whether a federal lien attaches to the property. In *Ginsberg* v. *Lindel,* 107 F. 2d 721, the Eighth Circuit, while deciding that a congressional statute was not intended to apply retrospectively to affect a property right already vested by state law, suggested that such retrospective application, if intended, would be unconstitutional under the Fifth Amendment. 107 F. 2d at 725–26.[7]

Finally, *Federal Land Bank* v. *Shoemaker,* 155 Kan. 501, 126 P. 2d 205, and *Federal Land Bank* v. *Ludwig,* 157 Kan. 657, 143 P. 2d 784, have no pertinence, since they involved no conflict between federal and state law. See n. 4, p. 6, *supra.*

CONCLUSION

For the reasons stated in the Government's main brief and for the further reasons stated herein, the judgment of the Supreme Court of Kansas affirming the trial court's denial of the Government's motion for an order directing the clerk to issue to it a certificate of redemption, should be reversed and the cause re-

[7] In the instant case, the Hetzels' contract was entered into *after* the enactment of 28 U.S.C. 2410. See *supra*, pp. 5, 8.

manded with instructions to permit the United States to redeem the property.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
SHERMAN L. COHN,
Attorneys.

OCTOBER 1960.

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SUPREME COURT OF THE UNITED STATES

No. 18.—October Term, 1960.

United States, Appellant, v. John Hancock Mutual Life Insurance Co., George Hetzel and Grace Marie Hetzel.	On Appeal From the Supreme Court of Kansas.

[November 7, 1960.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The issue in this case is whether the United States, as the second mortagee of real estate judicially foreclosed in a proceeding to which the United States was made a party under 28 U. S. C. § 2410[1] can redeem within one year from the date of sale pursuant to 28 U. S. C. § 2410 (c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period.

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[1] "Actions affecting property on which United States has lien.

"(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

"(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer,

The facts are not in dispute and, insofar as here pertinent, may be summarized as follows. Appellee John Hancock Mutual Life Insurance Co. held a note for $25,000, secured by a mortgage on certain Kansas real estate. The note was in default and the insurance company instituted proceedings in the District Court of Edwards County, Kansas, seeking a declaration that its mortgage constituted a first lien on the property and asking foreclosure to satisfy this lien. An agency of the United States, the Farmers' Home Administration, held four notes executed by the mortgagors against whom the insurance company was proceeding and one of these notes, in the face amount of $10,565, was secured by a mortgage on the property securing appellee's note. It is undisputed that the United States' secured note was junior in priority to that held by appellee. However, under Kansas law, a senior lienor must join junior lienors in the fore-

plead or demur within sixty days after such service or such further time as the court may allow.

"(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises."

closure proceeding in order to cut off the junior liens. *Motor Equipment Co.* v. *Winters*, 146 Kan. 127, 69 P. 2d 23. And the only way in which the United States can be joined in its capacity as junior lienor is pursuant to the terms of 28 U. S. C. § 2410, since the United States has not otherwise waived sovereign immunity in this type of situation. Consequently, appellee insurance company joined the United States and the United States cross petitioned for an adjudication that it held a second lien on the property, inferior only to appellee's lien, in the amount owed on all four notes. The Kansas District Court held that appellee enjoyed a first lien entitling it to a judgment of $26,944.78 and that the United States held a second lien by virtue of its secured note, entitling it to $10,402.61.[2] The court ordered both liens foreclosed. At the foreclosure sale, the insurance company bought in the property in the amount of its own judgment. The United States did not bid and the sale was confirmed by the District Court on February 5, 1958. Four months later—on June 5, 1958—the United States instituted proceedings to redeem the property pursuant to the terms of 28 U. S. C. § 2410 (c). This section specifies that, when the United States is joined in a foreclosure proceeding under § 2410—in particular § 2410 (a)—and a sale is held to satisfy a lien prior to that of the United States, "the United States shall have one year from the date of sale within which to redeem." Although the United States satisfied the procedural requirements of Kansas law, Kan. Gen. Stat., 1949, § 60-3451, its tender was refused and, consequently, it moved the court to compel the clerk to issue it a redemption certificate. The District Court denied relief and the

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[2] Judgment for $2,642.39 was entered in favor of the United States on the three unsecured notes. While the United States sought to include these notes in its second lien on the property, the court decreed that this lien extended only to the amount of the secured note.

Kansas Supreme Court affirmed,[3] holding that the United States' action was barred by the provisions of state law granting the mortgagor the exclusive right to redeem his property during a period of twelve months following the date of a foreclosure sale.

The pertinent Kansas law provides that the mortgagor shall have the exclusive right of redemption for twelve months following the date of sale; thereafter, if the mortgagor has not redeemed, the lien creditors enjoy a three-month period during which they, or the mortgagor, may redeem.[4] Kan. Gen. Stat., 1949, § 60–3440. If the mortgagor redeems at any time, all redemption rights are cut off. *Sigler* v. *Phares,* 105 Kan. 116, 181 P. 628. In this case, the mortgagors redeemed within twelve months of the date of sale but subsequent to the attempt of the United States to redeem.

The narrow question for our decision is whether that part of § 2410 (c) which grants the United States a right to redeem applies to the present situation. If it does, then the inconsistent provisions of state law must fall under the Supremacy Clause of the United States Constitution.[5] U. S. Const., Art. VI.

On analysis, the question is not only narrow but also susceptible to rapid solution since the plain language of § 2410 (c) reveals no impediment to its applicability once

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[3] *John Hancock Mutual Life Ins. Co.* v. *Hetzel,* 185 Kan. 274, 341 P. 2d 1002.

[4] From the fifteenth to and including the eighteenth month the mortagagor resumes enjoyment of the exclusive right to redeem. Kan. Gen. Stat., 1949, § 60–3439. Upon the expiration of eighteen months without redemption, the purchaser's certificate of title becomes absolute. Kan. Gen. Stat., 1949, § 60–3438.

[5] Appellees argue briefly that Congress does not have the power to establish rules governing state created property rights, citing *United States* v. *Bess,* 357 U. S. 51. This contention was raised and rejected in *United States* v. *Brosnan,* 363 U. S. 237, 240–241.

resort is had to § 2410 (a). Moreover, an examination of the legislative history of § 2410 shows that Congress considered the redemption provision of § 2410 (c) an important and integral feature of § 2410. The pertinent excerpts reveal that Congress feared a situation where the United States, as junior lienor, would find its lien dissolved pursuant to § 2410 without having had a chance to protect its right to any amount the foreclosed property might be worth in excess of the senior lien.[6] As Congress recognized, one method of protection for junior lienors is to bid competitively at the foreclosure sale, thereby preventing property worth more than the amount due on the senior lien from being sold at a discount. However, it was noted that, barring special circumstances, the United

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[6] Initial concern was expressed by Representative Bloom in a colloquy reported at 72 Cong. Rec. 3120–3121. Despite the apprehension expressed in this exchange, the bill that eventually became § 2410 passed the House with no provision to protect the United States' rights as junior lienor. The Senate, however, added a new section authorizing the United States to bid at the foreclosure sale and a delay of the sale until the completion of the next succeeding session of Congress so as to allow the Government time to obtain a congressional appropriation with which to make its bid. S. Rep. No. 351, 71st Cong., 2d Sess. 1–2.

This addition was stricken by the Conference Committee and the redemption provision now in § 2410 (c) was substituted. In rejecting the Senate proposal for protecting the rights of the United States as a junior lien holder, the Conference Committee concluded that a federal redemption provision was a more effective method for protecting those rights. It stated:

"The Senate amendment contains a clause allowing the court to stay proceedings on sale until the expiration of the next session of Congress. This was no doubt intended to allow Congress to appropriate money to enable the United States, if a junior lien holder, to bid enough at the sale to take care of prior liens and thus protect its own. In place of that the substitute bill provides that if a junior lien holder, the United States shall have a year in which to redeem. That does away with any necessity for a delay of sale." H. R. Rep. No. 2722, 71st Cong., 3d Sess. 4.

States could not pursue this procedure unless it first secured an appropriation from Congress and, thus, the one-year period of redemption was inserted to afford the United States sufficient time to secure an appropriation and protect its interests. The protective nature of the redemption proviso in § 2410 (c) was recognized in *United States* v. *Brosnan*, 363 U. S. 237, 246, where this Court stated that "the Government is guaranteed a one-year right to redeem if the plaintiff proceeds under § 2410 . . . ." This proposition is in line with the well-settled rule that Congress may impose conditions upon a waiver of the Government's immunity from suit. See *e. g., Soriano* v. *United States*, 352 U. S. 270, 276, where we added that these protective conditions "must be strictly observed and exceptions thereto are not to be implied."

Appellees concede, as they must, that § 2410 was mandatorily applicable to the present situation since Kansas law required joinder of the United States and the United States can only be joined pursuant to § 2410. However, they would have us find a superseding congressional intent to afford the United States a right of redemption only when no such right is granted under state law; when some privileges of redemption are given by the State to junior lienors, although of lesser magnitude than that provided in § 2410 (c), then the federal right is no longer pertinent. The short answer to this contention is that no indication of such a limitation appears in the body of the statute—which specifies that the United States "shall" have one year to redeem—or in its legislative history. See *Soriano* v. *United States, supra.*

Appellees also press upon us the fact that the federal agency here concerned, the Farmers' Home Administration, could have protected its junior lien without insisting on a right to redeem under § 2410, since 7 U. S. C. § 1025 authorizes the Secretary of Agriculture, who supervises the

Farmers' Home Administration, to bid at foreclosure sales.[7] But the significance of this section and its effect on § 2410 is not clear. Concededly, if there were some indication in §1025 that the power of the Secretary of Agriculture is limited to bidding at the foreclosure sale, then we would be faced with a problem of resolving the two statutes. Cf. *United States* v. *Stewart,* 311 U. S. 60. However, there is no conflict, either express or implied, between § 1025 and § 2410. In effect, appellees would have us read § 2410 as authorizing redemption "except where another federal statute authorizes the particular agency concerned to bid at foreclosure sales." The only support for such an interpretation is the fact that some federal agencies are authorized to bid at foreclosure sales. We think that the logical connection is insufficient to support such a violent graft on the language of the statute.

Appellees advance several other contentions which require only brief discussion. They argue, citing *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, that the United States, by seeking affirmative relief in a state court, subjects itself to all the incidents of state law which govern other suitors. See Hart & Wechsler, The Federal Courts and the Federal System 1112. However, we need go no farther than the *Guaranty Trust* case to uncover one of the several special rules which favor the United

[7] "The Secretary is authorized and empowered to bid for and purchase at any foreclosure or other sale, or otherwise to acquire property pledged or mortgaged or conveyed to secure any loan or other indebtedness owing to or acquired by the Secretary under sections 1001–1005d, 1007, and 1008–1029 of this title; to accept title to any property so purchased or acquired; to operate for a period not in excess of one year from the date of acquisition, or lease such property for such period as may be deemed necessary to protect the investment therein; and to sell or otherwise dispose of such property in a manner consistent with the provisions of section 1017 of this chapter."

States in preference to other plaintiffs—the rule that the United States is not subject to local statutes of limitations. See *United States* v. *Summerlin*, 310 U. S. 414. Other such rules, applicable in both federal and state courts, can be found in 28 U. S. C. §§ 2404, 2405, 2407, 2408, 2413. Furthermore, the present proceedings were not initiated by the United States but by appellee insurance company when it joined the United States pursuant to § 2410.

Appellees also point to the first sentence of § 2410 (c)—"a judicial sale in such action or suit shall have the same effect respecting the discharge of property from liens . . . held by the United States as may be provided . . . by the local law of the place where the property is situated." The contention is that this sentence governs all the succeeding language in § 2410 (c). However, this construction would render the succeeding language nugatory. The more rational interpretation is that the propositions following the first sentence in § 2410 (c) were designed as qualifications on the first sentence. This thesis gains force from the fact that the sentence setting out the United States' redemption privilege in § 2410 (c) previously was preceded by the words "*And provided further.*" 46 Stat. 1529. This phrase was eliminated in the 1948 revision of the Federal Judicial Code but the Reviser's Note indicates that no substantive changes were intended. 28 U. S. C. A. § 2410.

Therefore, the judgment of the Supreme Court of Kansas must be reversed and the case remanded with instructions to order the issuance of a certificate of redemption to the United States in accordance with its tender made in the District Court. However, in case the mortgagors wish to redeem in turn from the United States—a procedure in which the United States has acquiesced—we intimate no opinion as to the amount due the United States. The question whether the United States is

entitled to payment of its claims in full upon redemption by the mortgagors or only to such debts as have been declared liens by the state courts is one to be decided according to Kansas law. Cf. *First National Bank & Trust Co.* v. *MacGarvie*, 22 N. J. 539, 547, 126 A. 2d 880, 885.

Reversed and remanded.